EDITOR'S NOTE

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. 84-6470-CFX
atus: GRANTED

Title: Robert Davidson, Petitioner
v.
Joseph Cannon, et al.

cketed:
rch 27, 1985

Court: United States Court of Appeals
for the Third Circuit

Counsel for petitioner: Crawford, James D.

Counsel for respondent: Mansier, Madeleine Waters

try	Date	Note	Proceedings and Orders
1	Mar 27 1985	G	Petition for writ of certiorari and motion for leave to proceed in forma pauperis filed.
3	May 1 1985		Brief of respondents Joseph Cannon and Robert James in opposition filed.
4	May 2 1985		DISTRIBUTED. May 16, 1985
5	May 14 1985	X	Reply brief of petitioner Robert Davidson filed.
7	May 17 1985		REDISTRIBUTED. May 23, 1985
9	May 24 1985		REDISTRIBUTED. May 30, 1985
1	Jun 3 1985		Petition GRANTED. The case is set for oral argument in tandem with No. 84-5872, Daniels v. Williams.
			**********
2	Jul 30 1985		Joint appendix filed.
6	Jul 23 1985		Order extending time to file brief of respondent on the merits until September 19, 1985.
7	Jul 22 1985		Brief of petitioner Robert Davidson filed.
8	Aug 19 1985		Brief amicus curiae of Americans for Effective Law Enforcement, Inc., et al. filed.
9	Sep 11 1985		SET FOR ARGUMENT. Wednesday, November 6, 1985. (4th case).
0	Sep 19 1985		Brief of respondents Joseph Cannon, et al. filed.
1	Sep 19 1985		Brief amicus curiae of United States filed.
2	Oct 1 1985	G	Motion of the Acting Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.
3	Sep 12 1985		CIRCULATED.
4	Oct 15 1985		Motion of the Acting Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED.
5	Oct 21 1985		Record filed.
6	Nov 6 1985		ARGUED.
7	Nov 6 1985		ARGUED.

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No. 84 6470

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1984

ROBERT DAVIDSON,

Petitioner

v.

JOSEPH CANNON and
ROBERT JAMES,

Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

James D. Crawford
Attorney for Petitioner

Julie A. Waddell
SCHNADER, HARRISON, SEGAL & LEWIS
Suite 3600, 1600 Market Street
Philadelphia, Pennsylvania 19103

Of Counsel.

73 AP

QUESTION'S PRESENTED

1. When courts of appeals are in conflict over whether negligent state action resulting in serious physical injury to a prison inmate may constitute a deprivation of liberty under the due process clause of the Fourteenth Amendment, should not this Court resolve this critical dispute?

2. When the court below ruled that negligent state action resulting in serious physical injury to a prison inmate could never constitute a deprivation of liberty under the due process clause of the Fourteenth Amendment, did not that ruling conflict with this Court's decision in Parratt v. Taylor?

3. When state law completely forecloses a prison inmate from any remedy, legal or administrative, for serious physical injuries proximately caused by negligent state action, is not this absolute prohibition a denial of procedural due process of law under the rule established by this Court in Parratt v. Taylor?

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PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF
APPEALS FOR THE THIRD CIRCUIT

Robert Davidson petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit entered in this case on December 27, 1984.[1]

OPINIONS BELOW

The decision of the United States District Court for the District of New Jersey (1A-10A), sustaining petitioner's claim for relief under § 1983, has not been officially reported.

The opinion of the United States Court of Appeals for the Third Circuit (12A-48A), reversing the decision of the district court, is reported at 752 F.2d 817.

JURISDICTION

The case was argued before the court of appeals on December 1, 1983. The case was reargued before the court in banc on May 7, 1984, and was decided on December 27, 1984. This petition is being filed within 90 days of December 27, 1984.

This Court has jurisdiction to review the judgment of the court of appeals under 28 U.S.C. § 1254(1).

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1. The defendants in the district court included Edward O'Lone and Arthur Jones who were not parties in the court of appeals and are not parties before this Court.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Section 1 of the Fourteenth Amendment provides in pertinent part:

> .... nor shall any State deprive any person of life, liberty, or property, without due process of law....

42 U.S.C. § 1983 provides:

> Every person, who under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other persons within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For any purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

N.J. Stat. Ann. § 59.5-2 provides in pertinent part:

> Neither a public entity nor a public employee is liable for:
>
> ***
>
> b. any injury caused by;
>
> ***
>
> (4) a prisoner to any other prisoner.

STATEMENT OF THE CASE

This petition raises the question "whether 42 U.S.C. § 1983 encompasses a claim for personal injury to a state prisoner based on the negligence of prison officials when New Jersey state law provides no remedy."[2] Although both petitioner and the three judges who dissented from the decision of the court in banc believe that this Court decided that question in the affirmative in Parratt v. Taylor, 451 U.S. 527 (1981), the contrary decision of the majority of the court in banc, the multiple conflict in the circuits, and the decision of two other courts of appeals to set the question down for in banc consideration in the wake of the decision below, see pp. 6-9 infra, make it clear that only this Court can establish the meaning of Parratt. On the other hand, if petitioner is correct in his reading of Parratt, summary reversal may well be the appropriate vehicle for clarifying the law in this area.

The court in banc held that Parratt did not require it to recognize petitioner's claim for injuries resulting from his jailers' negligence. In reaching this decision, the majority necessarily concluded that Parratt held either: (1) that although the availability of a state remedy for negligence abrogates any right to sue which might exist under § 1983, the absence of a state remedy does not conversely establish a procedural due process claim under that provision; or (2) that although § 1983 may provide redress for a negligent deprivation of property worth $23.50, it does not provide similar recourse for a negligent deprivation of liberty resulting in serious bodily injury to a prisoner who has been deprived of the power

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2. Opinion of the court of appeals in banc, 752 F.2d at 818-19, 13A-14A

to flee or defend himself. Neither conclusion, petitioner suggests, is a fair reflection of the rules which this Court has established in Farratt, its predecessors and its progeny.

The Facts Leading to this Suit

This suit was brought by Robert Davidson against prison officials seeking damages under § 1983 for injuries he suffered when they negligently failed to protect him from another inmate. On December 19, 1981, petitioner Robert Davidson was threatened by one McMillian, a fellow inmate at New Jersey's Leesburg State Prison. Davidson wrote a note which informed the prison authorities, respondents Joseph Cannon and Robert James, of the threat. Respondents negligently failed to investigate the threat or to take measures to protect Davidson. On Sunday, December 21, McMillian made good his threat, assaulting Davidson with a fork, breaking Davidson's nose and inflicting serious wounds on Davidson's face, neck, head and body. As a result of the attack, Davidson was forced to undergo surgery. Davidson continued to experience severe pain and other residual effects of the multiple injuries which he sustained at the time of trial more than a year later.

Under New Jersey law, Davidson is foreclosed from obtaining any recovery from respondents for the injuries which he sustained as a result of their negligent conduct. The New Jersey Tort Claims Act provides that: "Neither a public entity nor a public employee is liable for...any injury caused by...a prisoner to any other prisoner." N.J. Stat. Ann. § 59:5-2(b)(4). It is undisputed that as a result of this provision, petitioner does not have any claim against either respondents or the state under state law.

The Decision of the District Court.

Davidson brought suit in the United States District Court for the District of New Jersey under 42 U.S.C. § 1983. In his pro se complaint he alleged the action of his jailers violated his constitutional rights under the Eighth and Fourteenth Amendments. The district court found that respondents had been negligent in failing to take reasonable steps to protect Davidson and that this negligence was a proximate cause of the injuries which Davidson sustained. The district court further ruled that respondents' negligent conduct did not violate the Eighth Amendment but did constitute a deprivation of petitioner's liberty within the meaning of the Fourteenth Amendment. Finally since the New Jersey Tort Claims Act completely forecloses Davidson from obtaining any state law remedy, the district court concluded that, under Parratt, Davidson had been deprived of his liberty without due process of law. Petitioner was awarded $2,000 in compensatory damages.

The Decision of the Court of Appeals.

Respondents appealed the district court decision to the United States Court of Appeals for the Third Circuit, which for the first time appointed counsel to represent Davidson. After the case had been argued to a panel of that court, the court on its own motion set the case down for reargument before the court in banc. The court in banc, over the dissents of Judges Seitz, Gibbons, and Higginbotham, reversed, holding that a mere negligent invasion of a prison inmate's liberty interest to be free from bodily injury can never give rise to a claim under the Fourteenth Amendment and § 1983.

The majority of the court in banc, speaking through Judge Sloviter, treated the question as one of substantive due

process. Having reaffirmed the district court's finding of negligence and determination that a liberty interest was involved, the majority held that an act of simple negligence could not constitute a "deprivation" of that liberty interest in a constitutional sense. 752 F.2d at 829, 24A. Turning to the procedural due process issue which formed the basis for Davidson's argument, the majority then ruled that a procedural due process claim would be cognizable under § 1983 only if an independent substantive constitutional violation had also occurred. Id. at 830, 25A.

The three dissenting judges, on the other hand, engaged in a straightforward Parratt procedural due process analysis, id. at 833-35, 28A-30A (Seitz, J., dissenting); id. at 846, 849, 41A, 44A (Gibbons, J., dissenting); see id. at 854, 48A (Higginbotham, J., dissenting), stating that once respondents' negligent acts invaded Davidson's liberty interests, the Fourteenth Amendment guaranteed him due process to redress that invasion.

REASONS FOR GRANTING THE WRIT

1. An Authoritative Decision of This Court Is Necessary To Resolve a Serious Conflict of Authority.

In Parratt v. Taylor, 451 U.S. 527 (1981), this Court ruled that state action resulting in the loss of property worth $23.50 constituted a deprivation which was actionable under 42 U.S.C. § 1983 even though the loss was caused by negligence. The Parratt Court went on to hold that Nebraska had not denied Taylor due process of law because the Nebraska tort claims procedure provided that process of law which was due Taylor in seeking redress for the deprivation of property. But, as the succeeding section of this petition makes clear, the ultimate decision in Parratt that Taylor had not stated a claim under § 1983 does not

render the Court's initial determination -- that the negligent loss of property could constitute a deprivation actionable under that statute -- mere dictum. Rather, under settled principles of constitutional law, the Court would not have reached the due process issue if it could have decided the case on non-constitutional grounds. Rescue Army v. Municipal Court, 331 U.S. 549, 568-75 (1947). If § 1983 does not reach negligent deprivations of property, then the case could have been decided on statutory grounds alone.

In Parratt, this Court did not explicitly consider whether the loss of life or liberty due to the negligence of state officials similarly provides a basis for liability under § 1983. See Richardson v. Fleming, 651 F.2d 366, 372 (5th Cir. 1981). Since Parratt, six courts of appeals have faced the question, three and perhaps four deciding that the Parratt analysis applies to life and liberty interests and the court below and one other taking a contrary position.

In conflict with the court below, the United States Courts of Appeals for the Fourth,[3] Fifth,[4] Ninth,[5] and perhaps

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3. Daniels v. Williams, 720 F.2d 792 (4th Cir. 1983), reh'g en banc granted (August 29, 1983), involved a civil rights action against a deputy sheriff for injuries sustained when the plaintiff inmate slipped and fell on a pillow which the sheriff negligently had left on the prison stairs. On appeal, the Fourth Circuit rejected the inmate's argument that Parratt did not apply to the case, and that the inmate therefore had stated a § 1983 claim even if state law provided an adequate postdeprivation remedy. The Fourth Circuit held that Parratt "applies to deprivations of nonproperty interests which do not violate substantive constitutional rights, including negligent deprivations of the liberty interest in freedom from bodily injury." Id. at 796.

4. In Thibodeaux v. Bordelon, 740 F.2d 329 (5th Cir. 1984), the plaintiff inmate sued for injuries sustained when officials negligently permitted an intoxicated prisoner to set fire to the jail. On appeal, the Fifth Circuit ruled that Parratt applied to negligent deprivations of liberty interests such as the one involved in Thibodeaux and the instant case. Id. at 339. Noting that the lower courts were

(Footnotes continued on next page)

the Seventh' Circuits, have ruled that the negligent deprivation

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(Footnotes continued from previous page)

seriously split "on the principal question posed by this case: whether Parratt should apply to a negligent deprivation of a liberty interest," id. at 335, Judge Wisdom noted that the Supreme Court had lent some clarity to the confusion by its recent decision in Hudson v. Palmer, ___ U.S. ___, 104 S. Ct. 3194 (1984), which indicates that Parratt should be viewed not as "an isolated rule but rather [as] part of a consistent body of procedural due process doctrine" applicable to negligent and intentional deprivations of both property and liberty interests. Id. at 336.

5. In Haygood v. Younger, 718 F.2d 1472 (9th Cir. 1983), rehearing en banc granted, 729 F.2d 613 (March 26, 1984), the Ninth Circuit held that Parratt applied to a situation in which negligent conduct by prison officials resulted in the plaintiff's confinement in prison for five years past the completion of the plaintiff's sentence. See also Wakineona v. Olin, 664 F.2d 708, 715 (1981) (Canby, J., on denial of rehearing), rev'd on other grounds, ___ U.S. ___, 103 S.Ct. 1741 (1983).

6. Although the Seventh Circuit has stated that it will apply Parratt to deprivations of life and liberty as well as property, Guenther v. Holmgreen, 738 F.2d 879, 882 (7th Cir. 1984), and State Bank v. Camic, 712 F.2d 1140, 1147 (7th Cir. 1983), cert. denied, ___ U.S. ___, 104 S.Ct. 491 (1983); see also Ellis v. Hamilton, 669 F.2d 510, 515 (7th Cir. 1982), it has suggested that a negligent deprivation of life or liberty cannot give rise to a claim under § 1983. See, e.g., Camic, where the Seventh Circuit affirmed the District Court's grant of summary judgment for defendants in a § 1983 action against jail officials for negligently failing to supervise an inmate to prevent his suicide while incarcerated. At trial the district court judge concluded:

> "Because the uncontested facts failed to establish any wrongdoing by the defendants beyond an isolated omission to supervise the prisoner, the claim involved simple negligence at best that does not give rise to the level of a constitutional deprivation." Id. at 1143.

On appeal, the Seventh Circuit found that the possibility of recovery under the Illinois wrongful death statute provided due process sufficient to negate the plaintiff's § 1983 claim. Id. at 1147. In an alternative holding, however, the court ruled that plaintiff's claim would fail even if Parratt applied only to deprivations of property. If Parratt were so limited, the court concluded that a due process violation of a nonproperty interest would require intentional action on the part of the defendant, or conduct so egregious that it "shocks the conscience." Id. at 1147, citing Rochin v. California, 342 U.S. 165, 172 (1952). The simple negligence of the defendants in Camic simply did not meet the standard. Id. at 1148. Cf. Anton v. Lehpamer, 584 F. Supp. 1382, 1384 (N.D. Ill. 1984), (interpreting Camic).

of a prison inmate's liberty, like a negligent deprivation of that inmate's property, may give rise to a procedural due process claim under § 1983.' In extending Parratt to situations similar to the one involved in the instant case, these courts have concluded that "the logic of Parratt permits of no principled distinction between deprivations of property and liberty interests." Thibodeaux v. Bordelon, 740 F.2d 329, 337 (5th Cir. 1984), quoting Juncker v. Tinney, 539 F. Supp. 574, 578 (D. Md. 1982). These courts of appeals, like the Parratt Court, of necessity resolved that the statutory reach of § 1983 encompasses negligent deprivations of liberty in order to reach the due process question.

By contrast, the court below held that negligent state action resulting in the loss of a prison inmate's liberty can never provide the basis for a § 1983 procedural due process claim. 752 F.2d at 829, 25A. The Court of Appeals for the Eighth Circuit has also indicated that the negligent loss of life or liberty cannot constitute a deprivation actionable under § 1983.' Unlike the Fourth, Fifth, Ninth, and perhaps Seventh Circuits, these courts hold that because the negligent deprivation of a prisoner's liberty interests is not actionable as a substantive due process claim, it cannot be actionable as a Parratt procedural due process claim either.

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7. Numerous district courts similarly have held that Parratt applies to negligent deprivations of liberty as well as property. See, e.g., Juncker v. Tinney, 549 F. Supp. 574, 576 (D. Md. 1982); Flores v. Edinburg Consolidated Independent School District, 554 F. Supp. 974, 977-979 (S.D. Tex. 1983); Eberle v. Baumfalk, 524 F. Supp. 515, 517-18 (N.D. Ill. 1981); Holmes v. Wampler, 546 F. Supp. 500, 503 (E.D. Va. 1982).

8. E.g., Mill v. Smith, 656 F.2d 337, 340 and n.2 (8th Cir. 1981): Police negligence in shooting escaped inmate not actionable under § 1983 as a violation of either Eighth or Fourteenth Amendment.

This conflict must be resolved.

2. The Decision by the Court Below Is Fundamentally Inconsistent with the Decision of this Court in Parratt v. Taylor.

In holding that negligent state action resulting in serious physical injury to a prison inmate can never constitute a deprivation within the meaning of the Fourteenth Amendment and § 1983, the court below misread the rule of law which this Court announced in Parratt. In Parratt, this Court granted certiorari for the express purpose of deciding whether mere negligence will support a claim for relief under § 1983. Noting that the divergence among the lower courts on this issue was "legion," and that this Court had twice granted certiorari to resolve the question but had subsequently found it unnecessary to decide, see Procunier v. Navarette, 434 U.S. 555 (1978), and Baker v. McCollan, 443 U.S. 137 (1979), Justice Rehnquist for the Court stated forthrightly:

> "We, therefore, once more put our shoulder to the wheel hoping to be of greater assistance to courts confronting such a fact situation than it appears we have been in the past." Id. 451 U.S. at 533-34.

This Court proceeded to hold that negligent state action resulting in the loss of a prison inmate's hobby kit "unquestionably" amounted to a deprivation within the meaning of the Fourteenth Amendment. 451 U.S. at 536-37. Moreover, in Hudson v. Palmer, ___ U.S. ____, 104 S. Ct. 3194 (1984), every member of the Court assumed that Parratt had established the proposition that a negligent invasion of a prisoner's constitutional interests required procedural due process redress under either state law or § 1983.

Nevertheless, in ruling that negligent state action resulting in a deprivation of liberty can never be actionable

under § 1983, the court below challenged this Court's decision in Parratt, and determined that "nothing in the Court's opinion in Parratt leads us to concluded that the Court held that merely negligent conduct by state officers constitutes a constitutional deprivation encompassed by § 1983." 752 F.2d at 826, 21A. Thus, the majority of the court below treated this Court's resolution of the question which the Court deemed central to its Parratt decision as mere dictum. Yet the Court plainly would not have reached the constitutional issue in Parratt if it could have decided the case on the statutory basis that mere negligence cannot give rise to a § 1983 action.[9]

The alternative basis for the holding of the court below is that a § 1983 cause of action may exist for the negligent deprivation of property, but not for the negligent deprivation of liberty. See 752 F.2d at 831, 26A (Garth and Weis, JJ., concurring). Thus, while in Parratt this Court ruled that negligent state action resulting in the loss of a hobby kit worth $23.50 constituted a deprivation within the meaning of the Fourteenth Amendment, the court below ruled that negligent state action resulting in the loss of the fundamental right to be free from serious bodily harm could never establish a deprivation of similar constitutional dimension.

The elevation of property over liberty by the opinion below, see 752 F.2d at 829, 24A, is in direct conflict with this Court's holdings. As this Court recognized in Parratt itself, a loss of liberty must be deemed "more egregious" than a

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9. Justice Powell's refusal to join the majority in Parratt provides further proof that the Court's ruling on the negligence issue constitutes part of its holding in that case. Criticizing the conclusions reached by the majority, Justice Powell stated that he "would not hold that such a negligent act, causing unintended loss of or injury to property, works a deprivation in the constitutional sense." 451 U.S. at 548 (Powell, J., concurring), emphasis in original.

loss of property. 451 U.S. at 542. The objections to the application of Parratt to cases involving deprivations of life or liberty, which were expressed by Justices White and Blackmun, id. at 545 (White, J., concurring); id. at 545-46 (Blackmun, J., concurring), can be understood only in this context.

Nevertheless, the courts of appeals which have addressed the issue have uniformly rejected the contention that § 1983 should be available to redress a negligent deprivation of life or liberty irrespective of the adequacy of state remedies.[10] Until the opinion of the majority below, however, no federal court has ever even intimated that whatever due process guarantees may apply to property, § 1983 should never be available to redress a negligent deprivation of life or liberty irrespective of the absence of any state law remedy.

The courts of appeals which have concluded that Parratt applies at least as much to liberty as to property have based this determination on a consistent line of case law established by this Court. As emphasized by the Fourth Circuit, Parratt made no distinction between property and nonproperty deprivations with respect to procedural due process. Daniels, 720 F.2d at 795. Thus, the Parratt majority cited Ingraham v. Wright, 430 U.S. 651 (1977), as consistent with its decision and approach to the resolution of the question before the Court. 451 U.S. at 541-43; see also id. at 547, n.1 (Powell, J., concurring). In Ingraham, this Court had held that corporal punishment in public schools did not deprive school children of liberty without due process of law where traditional common-law

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10. E.g., Gilmere v. City of Atlanta, 737 F.2d 894, 908 (11th Cir. 1984); Daniels, 720 F.2d at 794-96; Haygood, 718 F.2d at 1480-81.

remedies were fully adequate to afford due process. 430 U.S. at 672. Parratt's reliance on Ingraham is compelling evidence that the Court intended the Parratt procedural due process analysis to apply to deprivations of liberty interests.

Likewise, the Fifth Circuit has observed that the decision by this Court in Hudson v. Palmer, ___ U.S. ___, 104 S. Ct. 3194 (1984), further demonstrates that Parratt "is not an isolated rule but rather part of a consistent body of procedural due process doctrine applicable to both property and nonproperty deprivations. Thibodeaux, 730 F.2d at 336. In Hudson, this Court noted that its decision was foreshadowed by Parratt's treatment of Ingraham, which involved, as does the instant case, the deprivation of the fundamental liberty right to be free from bodily injury. ___ U.S. at ___, n.4, 104 S. Ct. at 3204, n.4.

By contrast, the Third Circuit has completely foreclosed the possibility that a negligent deprivation of liberty may ever give rise to a procedural due process claim under the Fourteenth Amendment and § 1983. Whether that decision is based on treating Parratt's holding as dictum or on limiting Parratt's protections to property rights, it is a wrong and dangerous precedent which only this Court can correct.

3. New Jersey's Total Denial of Any Remedy, Legal or Administrative, for the Invasion of Petitioner's Liberty Interest Constitutes a Denial of Procedural Due Process Actionable Under Parratt v. Taylor.

Finally, the majority of the court below held that it was immaterial that New Jersey provided Davidson no remedy for the negligent actions of prison personnel which caused his injury. Although the court below recognized that Davidson had a liberty interest of being free from injury, it ruled that since negligence did not constitute a deprivation of that

interest, he was entitled to no due process to redress it. In other words, procedural process was due Davidson only if he had already suffered a substantive constitutional violation.

In Parratt, this Court expressly differentiated the inmate Taylor's claim of procedural due process from the substantive constitutional claims which had been involved in earlier § 1983 cases. 451 U.S. at 536-37; see also id. at 550 (Powell, J., concurring). Indeed, it can scarcely be suggested that Parratt implicated any sort of substantive due process right whatsoever. The case involved the negligent loss of a hobby kit worth $23.50, "an event which by no stretch of the imagination can be considered to satisfy the substantive due process standard of 'shocking to the conscience.'" Holmes v. Wampler, 546 F. Supp. 500, 505 (E.D. Va. 1982), referring to the substantive due process standard established by this Court in Rochin v. California, 342 U.S. 165, 169 (1952). It is beyond dispute that Parratt, like the instant case, involved a claim of procedural due process, pure and simple.

Based upon the explicit differentiation drawn by this Court in Parratt, courts of appeals[11] have repeatedly ruled that Parratt's "limiting principle" does not apply to substantive violations of the Constitution. These decisions widely recognize, as emphasized by Justices Blackmun, White and Powell in their concurring opinions in Parratt, that in the case of a violation of a substantive constitutional right, a cause of action exists

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11. Daniels, 720 F.2d at 796; Wolf-Lillie v. Sonquist, 699 F.2d 864, 871-72 (7th Cir., 1983). See also Sampley v. Ruettgers, 704 F.2d 491, 496, n.6 (10th Cir. 1983), citing the concurring opinions of Justices White, Blackmun and Powell in Parratt, and concluding that it is not settled whether a postdeprivation state remedy can provide due process even when the loss of liberty does not violate a substantive interest.

under § 1983 even if state law provides a concurrent remedy.[12] The Parratt analysis comes into play, by contrast, only when the underlying wrong is not itself actionable under § 1983. Only then does it matter whether the state provides a forum to provide relief.

Yet the majority below held that petitioner's § 1983 procedural due process claim must fail because a substantive Fourteenth Amendment violation had not occurred. 752 F.2d at 830, 25A. Because of its conclusion that a substantive Fourteenth Amendment violation must exist to establish a § 1983 claim under Parratt, the court below never recognized that this case presents exactly the sort of denial of procedural due process which this Court in Parratt concluded would justify § 1983 relief.

The essential holding in Parratt is that a prisoner who has suffered negligent injury at the hands of his jailers is entitled to procedural due process. "The fundamental requirement of due process is the opportunity to be heard and it is an 'opportunity which must be granted at a meaningful time and in a meaningful manner.'" 451 U.S. at 540, quoting Armstrong v. Manzo, 380 U.S. 545, 552 (1965). In Parratt, this Court found that the remedies provided by Nebraska law could have fully compensated the inmate Taylor for the tortious loss of property which he suffered. 451 U.S. at 544. Because the state remedy was fully adequate, the deprivation there did not occur without due process of law. Id.

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12. Wolf-Lillie, 699 F.2d at 871-72; Daniels, 720 F.2d at 796, n.3. See also Palmer v. Hudson, 697 F.2d 1220, 1222, n.2 (4th Cir. 1983), rev'd on other grounds, ___ U.S. ___ 104 S. Ct. 3194 (1984). Parratt does not impinge upon the right to a § 1983 remedy for officially inflicted injuries which are sufficiently egregious to amount to a violation of the requirements of substantive due process.

In stark contrast to the remedies available to Taylor in the Parratt case, under New Jersey law public entities and employees are absolutely immune from liability for any injury which a prisoner causes to another prisoner. N.J. Stat. Ann. § 59:5-2 (b)(4). Because of this provision, Davidson does not possess any state claim whatsoever against respondents for the serious injuries which he received as a result of their proven negligence. 752 F.2d. at 819, 14A. Notwithstanding the fact that New Jersey completely forecloses petitioner from obtaining any recourse under state law, the majority of the court below failed to find a violation of procedural due process under Parratt. Yet, if the ruling by this Court in Parratt has any meaning, it must be concluded that the petitioner here has suffered a deprivation of liberty without due process of law, and that his § 1983 claim therefore must stand."

In this case, petitioner does not ask this Court to establish the outer parameters of Parratt or to wrestle with the difficult question of its general relation to the various doctrines of sovereign immunity. Petitioner asks only that this Court reaffirm the important principle that the "touchstone" of procedural due process is the "protection of the individual against arbitrary action of government," Wolff v. McDonnell, 418 U.S. 539, 558 (1974), and that this fundamental right assumes, at a minimum, the existence of at least one possible procedural safeguard against the deprivation of life, liberty or property at the hands of the government, Mathews v. Eldridge, 424 U.S. 319, 335 (1976).

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13. The Third Circuit itself had recognized as much in a similar situation, holding that Parratt "must be recognized as authorizing Section 1983 actions for negligent loss of property where adequate state procedures are not available." Holman v. Hilton, 712 F.2d 854, 860 (3d Cir. 1983), emphasis in original.

CONCLUSION

For all of these reasons, Robert Davidson prays this Court to grant his petition for a writ of certiorari.

James D. Crawford
Attorney for Petitioner

Julie A. Waddell
SCHNADER, HARRISON, SEGAL & LEWIS
Suite 3600, 1600 Market Street
Philadelphia, Pennsylvania 19103

Of Counsel.

Dated: March 27, 1985

NOT FOR PUBLICATION

RECEIVED
OCT 15 1982

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

ROBERT DAVIDSON, Plaintiff, v. EDWARD O'LONE, etc., et al., Defendants.	:	Civil Action No. 81-253
	:	ORIGINAL FILED OCT 13 1982 ALVIN J. LYE CLERK
	:	FINDINGS OF FACT AND CONCLUSIONS OF LAW

APPEARANCES:

Robert Davidson, Pro se
242 Undercliff Avenue
Edgewater, New Jersey 07020

Irwin I. Kimmelman, Attorney General of New Jersey
By: Lyle P. Hough, Jr., Deputy Attorney General
Richard J. Hughes Justice Complex
Trenton, New Jersey 08625
Attorneys for Defendants

BROTMAN, District Judge

This is a civil rights action brought pursuant to 42 U.S.C. § 1983 by a state prisoner. He is appearing pro se. The matter having come to trial on May 7, 1982, and the court having considered the evidence, exhibits and the submissions of the parties, we make the following findings of fact and conclusions of law.

FINDINGS OF FACT

1. Plaintiff Robert Davidson was an inmate at the New Jersey State Prison at Leesburg (hereinafter LSP) in December of 1980. He has since been paroled.

2. Defendant Joseph Cannon was the Assistant Superintendent at LSP in December, 1980.

3. Defendant Arthur Jones was a hearing officer for the New Jersey Department of Corrections in December, 1980. He is a civilian assigned by the Commissioner of Corrections to hear disciplinary disputes at a number of institutions, including LSP.

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4. Defendant Robert James was a Corrections Sergeant assigned to LSP in December 1980.

5. On December 17, 1980, plaintiff intervened in a fight between two other prisoners at LSP -- Gibbs and McMillian. After the fight was broken up, all three inmates received disciplinary charges for fighting and were placed in "lockup" status pending further investigation. The next morning, their status was changed to pre-hearing detention pending disciplinary hearings.

6. On Friday, December 19, 1980, each inmate had a disciplinary hearing before defendant Jones. Gibbs was found guilty of fighting. Plaintiff and McMillian were found not guilty and released to the general population.

7. After the hearings, McMillian told plaintiff that the fight was not over and verbally threatened to assault plaintiff.

8. Between 9:30 and 10:00 A.M., plaintiff returned to the hearing room and reported McMillian's threat to Officer Jose Garcia, a guard assigned to the hearing room. He stated that he wanted the prison officials to know about it. Officer Garcia told plaintiff to put the information in writing. Plaintiff wrote a note, intended for defendant Jones, which stated:

> "When I went back to the unit after seeing you McMillian was on the steps outside the unit. When I was going past him he told me 'I'll fuck you up you old mother-fucking fag.' Go up to your cell, I be right there.
>
> I ignored this and went to another person's cell and thought about it. Then I figured I should tell you so 'if' anything develops you would be aware.
>
> I'm quite content to let his matter drop but evidently McMillian isn't.
>
> Thank you, R. Davidson"

Defendants' Exhibit 5.

9. Plaintiff did not take other steps to secure his safety, such as requesting protective custody or attempting to convey the information to prison officials other than Jones.

10. While plaintiff regarded the threat as serious, he did not foresee the extent of the injuries actually incurred. His purposes in reporting the threat were (a) to have the prison officials intercede on his behalf by calling McMillian down and warning him not to cause trouble; (b) to exonerate himself in the event there was

-3- Da 14

further fighting.

11. Although plaintiff had been in various prisons for many years, plaintiff had never been attacked by another inmate. He had no prior institutional history of being involved in fighting or assaults.

12. Defendant Jones testified that McMillian had a history of assaults and fighting. He believed that if McMillian threatened to attack an inmate, there was some validity to the threat.

13. Defendant Jones instructed Officer Garcia to pass the note to the proper authorities at LSP. Defendant Jones himself was not a part of the institution and had no authority to take other precautionary action. His responsibilities do not involve the security of inmates.

14. Other disciplinary hearings continued until 11:30 A.M. At 11:40 A.M., Officer Garcia went to defendant Cannon's office to deliver plaintiff's note. Officer Garcia told Cannon that he had a note from Davidson about a threat by McMillian.

15. Cannon read the note, and instructed Officer Garcia to give the note to defendant James. Cannon intended that James investigate the note and get back in touch with Cannon if any action was warranted.

16. Although Cannon knew that McMillian had a history of fighting, he testified that he did not regard the note as reporting a serious threat. He concluded this because he was well-acquainted with plaintiff and believed that if plaintiff had a serious problem, he would have contacted Cannon directly.

17. If Cannon had regarded the threat as serious, he would have taken the following actions: (a) offered plaintiff protective custody or a housing change, and (b) confronted McMillian and warned him to control his behavior. In his experience, such warnings are effective at deterring disruptive conduct. In this case, he took no immediate action.

18. Officer Garcia then went to defendant James' office, but he was not in. Keeping the note in his pocket, Officer Garcia

went to lunch. After lunch he again checked James' office, but it was still empty. He succeeded in contacting James by telephone later in the afternoon, and brought the note to James between 2:00 and 2:15 P.M.

19. Officer Garcia told James that the note was being referred to James by Cannon for investigation, and that it reported a threat by McMillian against plaintiff. He did not indicate any urgency about the note.

20. James' usual procedure for investigating such a note is to interview the inmates. He testified that he did not do so because he was not directed to check it out immediately, and because he had other matters to attend to that he felt were of higher priority.

21. The note was left on James' desk while he investigated a report that an inmate had a knife in his cell. He had the cell secured, and went to search it. There was no knife in the cell. He finished this search about 4:00 P.M.

22. At 4:00 P.M., James' shift in the Department of Internal Affairs was over. He worked a second shift that day as Assistant Center Keeper, and was at the institution until 10:30 P.M. During this second shift, he did not take any action regarding plaintiff's note because he considered that task only as part of his Internal Affairs functions. However, James acknowledged that if plaintiff's note had been directed to him as Center Keeper (his evening post), he should have looked into it. Indeed, both Cannon and James testified that in order to receive prompt attention to the threat, plaintiff should have reported it to Center Keeper, rather than the hearing officer James.

23. James spent several hours that evening handling an inmate who in James' opinion was having a mental breakdown and was throwing tantrums.

24. After the note was delivered that afternoon, James spent only about ten minutes in his office. When he left the prison at about 10:30 P.M., he did not remember the note that remained on his desk. He testified that if he had remembered, he would have left it at the Center in order to alert the officers on morning shift.

25. None of the defendants worked on Saturday or Sunday, December 20 and 21, 1980.

26. On Sunday morning, December 21, 1980, McMillian attacked plaintiff at approximately 8:30 A.M. Plaintiff sustained numerous stab wounds inflicted with a metal fork, in his face, neck, head and body. In addition, his nose was broken.

27. Plaintiff was taken to the prison infirmary and then to Newcomb Hospital, a private hospital, for x-rays and treatment. He was returned to the prison the same day.

28. The stab wounds healed within several weeks and plaintiff has no residual complaints regarding them.

29. Plaintiff was to be admitted to St. Francis Hospital on December 26, 1980, to undergo surgery for his nose, but he requested that it be rescheduled because he expected a holiday visit.

30. The institutional physician, Stephen J. Sionis, D.O., reported by way of affidavit dated September 16, 1981, that plaintiff's diagnosis at that date was "post traumatic external and internal nasal deformities with septal deviation and right posterior nasal obstruction."

31. Plaintiff was admitted to St. Francis Hospital in December of 1981, almost a year after the attack, to undergo the surgical process of septorhinoplasty to correct his condition.

32. During the year interim, plaintiff suffered pain in connection with the broken nose and had difficulty breating. The institutional physician gave him nose spray, which did not alleviate his suffering.

33. After the surgery, plaintiff's breathing improved. He continues to complain of a voice change, sensitivity of the bridge of his nose, and a post nasal drip condition.

CONCLUSIONS OF LAW

Applying the reasoning set forth in our letter opinion of November 16, 1981,[1] we conclude that plaintiff has not established a

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1. We note the following errors in that opinion:

1. On page 1, the last sentence of the second paragraph should read, "On Sunday, December 21, 1980...."

claim of cruel and unusual punishment in violation of the Eighth Amendment. We so find because defendants did not act with deliberate or callous indifference to plaintiff's needs and because the incident complained of was a single attack.

We conclude that plaintiff has established, however, by a preponderance of the evidence his claim of unconstitutional deprivation of liberty without due process, as against defendants Cannon and Jones. We find that these two defendants negligently failed to take reasonable steps to protect plaintiff, and that he was injured as a result. Both of these officials had the responsibility to care for plaintiff's safety, actual notice of the threat by an inmate with a known history of violence, and an opportunity to prevent harm to plaintiff. Defendant Jones, we find, exercised due and reasonable care under the circumstances, as it was not within his responsibility or his authority at the institution to do more than refer the threat to the proper authorities.

Due process analysis has two steps -- first, identifying the nature of the interest at stake as a constitutionally protected one, and second, examining what degree of "process" is due. See, e.g., Hewitt v. Helms, 459 U.S. 460 (1983); Parratt v. Taylor, 451 U.S. 527 (1981); Hewitt v. Helms, 459 U.S. 460 (1983); Martinez v. California, 444 U.S. 277 (1980).

The first step is to inquire whether the assault here implicates a "liberty interest" protected by the due process clause. Freedom from physical attack and injury undeniably falls within the compass of constitutionally protected liberty. To be free of personal violence is the basic core of liberty. "To be free from, and to obtain judicial relief for, unjustified intrusions on personal security... [is one of] the historic liberties" protected at common law and by the

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1. (continued

2. On page 1, all references in the second paragraph to McMillian" should read "McMillian."

3. On page 2, the third sentence of the first paragraph should read "...about the chain of events of which plaintiff complains."

4. On page 2, the last sentence of the third paragraph should read, "...second, the negligent acts alleged do not rise to...."

5. On page 3, the fourth sentence of the first paragraph, following the parenthetical, should read, "...had not provided sufficient guidance...."

-6-

due process clause. Ingraham v. Wright, 430 U.S. 651, 672-73 (1977). See Youngberg v. Romeo, ___U.S.___, 102 S.Ct. 2452 (1982). Even while incarcerated, plaintiff enjoys a constitutionally protected interest in conditions of reasonable care and safety.

Defendants emphasize that plaintiff seeks to recover damages for a single attack. They refer to recent statements by the court of appeals that "[t]he right to protection is not actuated by an isolated mishap, or called into question by each bruise that a patient [here, prisoner] may suffer," and that "no one is guaranteed an injury-proof life." Romeo v. Youngberg, 644 F.2d 147, 163 (3rd Cir. 1980), vacated and remanded, 50 U.S.L.W. 4681 (June 18, 1982). But as defendants have also pointed out, the critical aspect is not the weight of the interest, but its nature. Board of Regents v. Roth, 408 U.S. 564, 570-71 (1972). Thus the first analytical step is whether security from assault is within the ambit of "liberty." Whether the assault is aggravated or repeated does not alter its nature, but simply its weight.

Furthermore, the instant case is not about a "bruise" or an inadvertent accident. It does not involve some "de minimis" personal injury, but a vicious and traumatic attack inflicting severe wounds. The defendants were personally apprised of the anticipated assault, and knowing of McMillian's violent character, did nothing to prevent its occurrence. Had reasonable precautions been taken, even as simple as issuing a warning to McMillian, the evidence suggests that plaintiff would not have been injured. Defendants knew that McMillian represented a "special danger" to plaintiff. Cf. Martinez v. California, 444 U.S. 277, 285 (1980).

Defendants argue that plaintiff did not enjoy a "liberty interest" in his personal security because defendants did not intentionally permit the assault, but were merely negligent about his safety. This argument confuses the notion of liberty interest with the notion of deprivation. State of mind has no relevance for purposes of identifying what is a liberty interest and what is not.

Rather, we believe defendants' argument is that state of mind is significant for purposes of determining whether the defendant deprived plaintiff of his liberty. Defendants suggest

that unless the actions of the state officials were intentional, reckless, or malicious, there has been no "deprivation" of rights. But as we have discussed in our prior opinion, the Supreme Court has held that a state official's negligence is sufficient to constitute a "deprivation" for due process purposes. Parratt v. Taylor, 451 U.S. 527 (1981). We do not agree with defendants that Parratt's holding regarding negligent deprivation is irrelevant to the instant case on the ground that Parratt involved a property rather than a liberty interest. We do not believe these categories are so rigid. The distinction between property and liberty interests does not alter the relevant reasoning, which is that § 1983 does not include a requirement that the official's act be intentional.[2] Defendants assert that we should impose a "deliberate indifference" standard, borrowed from the Eighth Amendment. See Estelle v. Gamble, 429 U.S. 97 (1976). This standard was rejected as inappropriate under due process analysis in Youngberg v. Romeo, 102 S.Ct. at 2456 n.11.

Defendants Cannon and James, acting under authority of state law, negligently deprived plaintiff of his liberty interest in remaining free from physical assault. This brings us to the second step of due process analysis, to inquire whether the state has provided the "process" which is due under the circumstances. As we discussed in our prior opinion, New Jersey provides plaintiff no process whatsoever by which to pursue a remedy against the state or state officials for injuries inflicted by another prisoner. N.J. Stat. Ann. 59:9-2 (West 1982).

The fact that plaintiff may have a tort claim against a different tortfeasor, the inmate McMillian, is immaterial. The question is not whether plaintiff has redress against some other party, but whether there is some process by which to remedy the deprivation of his liberty at the hands of the state officials. The tort claims procedures in Nebraska and Florida, analyzed in Parratt v. Taylor, supra, and Ingraham v. Wright, supra, provided a means by which the

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2. We would also point out that Parratt involved only an "isolated" incident of loss of property, valued at a very modest sum. Nonetheless, despite the fact that the interest was not very "weighty," the court identified its nature as one protected by the due process clause. This confirms our opinion that plaintiff has satisfied the first analytical step of showing a "liberty interest" at stake.

injured party could seek compensation from the state or state official responsible. New Jersey has cut off any such avenue of redress, thereby denying plaintiff his due process rights.

Defendants suggest that "the state will become an absolute insurer of the safety of people within its borders, as long as a causal nexus can be found between the injury and some action or inaction by the State." Defendants' Supplemental Trial Brief at 8-9. This alarming proposition is not the result of our decision. The state officials who are here defendants are liable only because two other criteria are also present: that their negligence caused the injury, and that the state provides no process by which to seek redress for the officials' action. Defendants also claim that this result will "transform every tort committed by a state employee into a civil rights complaint...." Brief at 13. We would point out that the state of New Jersey does afford a tort claims procedure for most victims of official tortfeasors; an exception was carved out of the act to exclude persons in plaintiff's situation from any procedural avenues, even a tort action against the state employees. Prior to the Tort Claims Act, such a tort action was available. Harris v. State, 61 N.J. 585 (1972).

Finally, defendants argue that they are shielded from liability in this case by the "qualified immunity" for prison officials upheld in Procunier v. Martinez, 434 U.S. 555 (1978). This immunity is founded on the premise that such officials "cannot be expected to predict the future course of constitutional law," id. at 561, and should not be held responsible for acts which were reasonably considered not to constitute an infringement of the prisoner's rights. The court held that since the right there violated, freedom from interference with prisoners' mail, had not been declared by the courts until several years after the officials confiscated or lost the mail in question, qualified immunity protected the officials. They had no way of knowing that the prisoner had First Amendment rights in connection with his mail.

We do not believe that the instant case is similar. Defendants do not assert that they were unaware that a prisoner had a right to be

free from personal assaults. Nor do they assert that they did not have a duty to protect him from such attacks. Instead, they assert that they did not know they would be held responsible for their negligence in denying plaintiff this right. But this obviously could not have influenced their actions — negligence is by its nature unintentional. We believe that Procunier v. Navarette focussed on situations in which a new substantive right has been announced after the allegedly wrongful behavior; we do not believe that it immunizes officials because of an intervening change in the requisite standard regarding state of mind. The important factor is that defendants, by their negligent conduct, subjected plaintiff to an unreasonable risk of physical attack, knowing that plaintiff was entitled to freedom from such assault.

Plaintiff's injuries, stab wounds and a broken nose which had to be surgically corrected, were serious and entailed severe pain over a significant period of time. We find that an award of $2,000.00 in compensatory damages is an appropriate judgment. Accordingly, judgment will be entered in favor of plaintiff and against defendants Cannon and Jones, jointly and severally, in the amount of $2,000.00. Our finding of no liability on defendant Jones' part will be reflected by judgment in his favor for no cause of action.

An appropriate order will be entered.

STANLEY S. HARRIS
United States District Judge

Dated: October 13, 1983

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

ROBERT DAVIDSON,	:	Civil Action No. 81-253
Plaintiff,	:	
v.	:	
	:	
EDWARD O'LONE, etc., et al.,	:	
Defendants.	:	O R D E R

This action having come to trial on May, 1982; and

The court having considered the testimony, exhibits, and arguments and submissions of the parties; and

For the reasons set forth in the court's findings of fact and conclusions of law filed this date,

It is on this 13th day of October, 1982, hereby ORDERED that judgment is entered for defendant Arthur Jones and against plaintiff Robert Davidson for no cause of action; and

It is FURTHER ORDERED that judgment is entered in favor of plaintiff Robert Davidson and against defendants Joseph Cannon and Robert James, jointly and severally, in the sum of two thousand dollars ($2,000.00).

No costs.

STANLEY S. BROTMAN
United States District Judge

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Robert DAVIDSON

v.

Edward O'LONE, Superintendent, Arthur Jones, Hearing Officer, Joseph Cannon, Superintendent, and Robert James, Internal Affairs.

Appeal of Joseph CANNON and Robert James.

No. 83-5743.

United States Court of Appeals, Third Circuit.

Argued Dec. 1, 1983.

Reargued In Banc May 7, 1984.

Decided Dec. 27, 1984.

State prison inmate, who had written a note indicating that another inmate had threatened him, brought civil rights action against prison officials after the threat was carried out. The United States District Court for the District of New Jersey, Stanley S. Brotman, J., granted summary judgment in favor of prison superintendent and subsequently awarded inmate damages against remaining prison officials, and prison officials appealed. The Court of Appeals, Sloviter, Circuit Judge, held that: (1) evidence supported finding that correction officers were negligent in failing to take steps to protect inmate; (2) inmate had liberty interest in being secure from attacks by fellow inmates; but (3) the negligent failure to take steps to protect inmate did not give rise to a claim under the Civil Rights Act, even though New Jersey law provided no remedy for inmate.

Reversed and entry of judgment for defendants directed.

Garth, Circuit Judge, filed concurring opinion in which Weis, Circuit Judge, joined.

Seitz, Chief Judge, Gibbons and A. Leon Higginbotham Jr., Circuit Judges, filed dissenting opinions.

1. Civil Rights ⇐13.13(3)

Evidence in civil rights action s ported finding that correction officers, w failed to take steps to protect an inm who had written a note indicating that other inmate had threatened him, w negligent in failing to take steps to prev the subsequent assault on inmate.

2. Civil Rights ⇐13.3(2)

State prisoner, who had written n indicating that another inmate had thre ened him, had liberty interest in his pers al security protected by the Fourtee Amendment, for purposes of his civil rig action against prison officials for their f ure to take steps to protect him. U.S.C Const.Amends. 5, 14; 42 U.S.C.A. § 19

3. Civil Rights ⇐13.4(1)

Negligence claims are not enc passed within the Civil Rights Act. U.S.C.A. § 1983.

4. Civil Rights ⇐13.4(1)

Essential element of an action brou pursuant to the Civil Rights Act is ab by a state official of his or her offi position. 42 U.S.C.A. § 1983.

5. Civil Rights ⇐13.1

The Civil Rights Act is primary vehi to provide redress for unconstitutional tion by state employees that violates Federal Constitution. 42 U.S.C.A. § 19

6. Civil Rights ⇐13.3(1)

A constitutional deprivation supporti a recovery under the Civil Rights Act is limited to violations under the Fourteen Amendment. 42 U.S.C.A. § 1983; U.S.C Const.Amend. 14.

7. Civil Rights ⇐13.4(5)

Application of force by police offic or prison guards exceeding that which reasonable and necessary under the circu stances states a claim under the Ci Rights Act. 42 U.S.C.A. § 1983.

8. Civil Rights ⇐13.4(5)

Prison officials are liable under t Civil Rights Act for an assault on an mate, even when the assault has been co mitted by another prisoner, if there is

tentional conduct, deliberate or reckless indifference to the inmate's safety, or callous disregard on the part of prison officials. 42 U.S.C.A. § 1983.

9. Civil Rights ⇐13.1

The Civil Rights Act plays an effective role in providing a federal forum to challenge an established state procedure that infringes upon an individual's liberty or property interests. 42 U.S.C.A. § 1983.

10. Civil Rights ⇐13.1

Actions may be brought in federal court under the Civil Rights Act when there has been infringement of a liberty interest by intentional conduct or an established state procedure, and viability of such actions does not depend on whether a post-deprivation remedy is available in state court. 42 U.S.C.A. § 1983.

11. Civil Rights ⇐13.6(5)

Correction officers' negligent failure to take steps to protect an inmate, who had written a note indicating that another inmate had threatened him, did not give rise to a claim under the Civil Rights Act when the threat was carried out, even though inmate had a liberty interest in being secure from attacks by fellow inmates, where one officer followed established procedure in directing prisoner to the proper officer but simply failed to follow up, and other officer, who was operating under a double shift burden, merely forgot to investigate the note, which was ambiguous as to nature of the threat and conveyed no sense of urgency. U.S.C.A. Const.Amends. 5, 14; 42 U.S.C.A. § 1983.

12. Constitutional Law ⇐299(2)

New Jersey statute foreclosing suit by a prisoner against either state or a prison employee for injuries caused by another prisoner did not violate state inmate's right to procedural due process in regard to his civil rights claim against prison officers who failed to take steps to protect him after he had written a note indicating that another inmate had threatened him, where inmate was not challenging constitutionality of the New Jersey statute but merely seeking money damages for injuries inflicted during the assault, and inmate had no federal constitutional, statutory, or other claim of entitlement of a substantive right which was deprived by defendants' negligence. 42 U.S.C.A. § 1983; N.J.S.A. 59:5-2, subd. b(4).

13. Civil Rights ⇐13.2(2)

A claim for procedural due process must be predicated on deprivation of a substantive right or interest created by the Federal Constitution, a statute or other entitlement. U.S.C.A. Const.Amends. 5, 14.

14. Civil Rights ⇐13.2(2)

The Federal Constitution does not insure that a putative plaintiff may maintain a particular type of negligence claim in state court, for purposes of maintenance of an action under the Civil Rights Act. 42 U.S.C.A. § 1983.

Originally Argued Dec. 1, 1983.

Before GIBBONS and SLOVITER, Circuit Judges, and GREEN, District Judge *

Reargued in Banc May 7, 1984.

Before ALDISERT, Chief Judge **, SEITZ, GIBBONS, HUNTER, WEIS, GARTH, HIGGINBOTHAM, SLOVITER and BECKER, Circuit Judges.

Madeleine W. Mansier (argued), Deputy Atty. Gen., Irwin I. Kimmelman, Atty. Gen. of New Jersey, Trenton, N.J., for appellants Joseph Cannon and Robert James; James J. Ciancia, Asst. Atty. Gen., Trenton, N.J., of counsel.

James D. Crawford (argued), Schnader, Harrison, Segal & Lewis, Philadelphia, Pa., for appellee.

OPINION OF THE COURT

SLOVITER, Circuit Judge.

The principal issue presented by this appeal is whether 42 U.S.C. § 1983 encom-

* Hon. Clifford Scott Green, United States District Judge for the Eastern District of Pennsylvania, sitting by designation.

** At the time of the reargument in banc, Judge Seitz was Chief Judge.

passes a claim for personal injury to a state prisoner based on the negligence of prison officials when New Jersey state law provides no remedy.[1]

I.

Plaintiff Robert Davidson was an inmate at Leesburg State Prison when, on December 17, 1980, he intervened in a fight between two other inmates, Gibbs and McMillian. The three had disciplinary hearings on the morning of December 19, and immediately afterward McMillian threatened Davidson. Davidson returned to the hearing room to report the incident and, at the request of the guard on duty, wrote a note intended for Arthur James, the hearing officer. The note said:

> When I went back to the unit after seeing you McMillian was on the steps outside the unit. When I was going past him he told me "I'll fuck you up you old mother-fucking fag." Go up to your cell, I be right there.
>
> I ignored this and went to another person's cell and thought about it. Then I figured I should tell you so "if" anything develops you would be aware.
>
> I'm quite content to let this matter drop but evidently McMillian isn't.
>
> Thank you, R. Davidson.

Da14.

Jones, to whom the note was addressed, was a civilian and not part of the prison administration. He told the guard, Jose Garcia, to pass the note to the proper officials. At 11:40 a.m. Garcia delivered it to Joseph Cannon, assistant superintendent of the prison. Cannon read it and told Garcia to give it to Corrections Sergeant Robert James. Cannon testified later that he did not regard the situation as urgent because Davidson, whom he had known for years, did not contact him directly, as he had previously done in various situations.

Sergeant James was not in his office, and Garcia did not get the note to him until after 2:00 p.m. Garcia told him then that the note reported a threat by McMillian against Davidson. James attended to other matters, which he described as emergencies, leaving the note on his desk. At 4:00 he started a second shift, as Assistant Center Keeper, in another part of the prison. Between the time he received the note and the time he left the prison that night, James spent only about 10 minutes in his office. He forgot about the note, which he had not read. James acknowledged that in such a situation he would ordinarily interview the inmates. Though he was not able to attend to the matter that day, he testified that if he had remembered the note he would have posted it at the Center to alert officers on the morning shift.

Davidson, as the parties have stipulated, took no other steps to notify the authorities or request protective custody. He testified that he did not foresee the attack, but wrote the note to exonerate himself in the event that McMillian started another fight. Davidson also testified that he wanted officials to reprimand McMillian.

Neither Cannon nor James worked on December 20 or 21. On December 21, McMillian attacked Davidson with a fork, inflicting wounds to his face, neck, head and body, and breaking his nose. Though the stab wounds healed within several weeks, Davidson has undergone surgery to correct problems stemming from his broken nose, suffering continuing pain and residual effects.

Davidson was foreclosed from recovery from these defendants for his injuries under state law, for the New Jersey Tort Claims Act provides that "[n]either a public entity nor a public employee is liable for . . . any injury caused by . . . a prisoner to any other prisoner." N.J.Stat.Ann. § 59:5-2(b)(4)(West 1982). The parties agree that as a result of this provision, Davidson has no state law claim for his injuries against the defendants or against the state.

Davidson brought suit in the United States District Court for the District of New Jersey under 42 U.S.C. § 1983, nam-

1. This appeal was originally heard by a panel of this court and then reheard by the court in banc pursuant to Chapter IX.A. of the Internal Operating Procedures of this court.

ing as defendants Cannon, James, Jones, and Edward O'Lone, the prison superintendent. The court granted summary judgment in favor of O'Lone. The case against the other three was tried with Davidson appearing *pro se*. The court concluded that plaintiff did not establish an Eighth Amendment violation "because defendants did not act with deliberate or callous indifference to plaintiff's needs and because the incident complained of was a single attack." Da18. The court concluded, however, that Cannon and James, but not Jones, negligently failed to take reasonable steps to protect Davidson, that Davidson was injured as a result, and that their negligence deprived Davidson of a constitutionally protected liberty interest in freedom from assault while in prison. The court reasoned that because the New Jersey immunity provision denied Davidson a hearing, Davidson had been deprived of his liberty interest without due process. Davidson was awarded compensatory damages of $2,000.

Defendants appeal, contending that the district court erred in concluding that they were negligent, that the court erred in concluding that an inmate such as Davidson in a state prison has a liberty interest in being protected by prison officials from a single assault by another inmate, and that the court erred in concluding that 42 U.S.C. § 1983 encompasses a claim arising out of a negligent failure by prison officials to protect an inmate against a single assault by another inmate. We will consider these contentions seriatim.

II.

[1] After hearing all of the relevant evidence, the district court concluded, with respect to Cannon and James:

> We find that these two defendants negligently failed to take reasonable steps to protect plaintiff, and that he was injured as a result. Both of these officials had the responsibility to care for plaintiff's safety, actual notice of the threat by an inmate with a known history of violence, and an opportunity to prevent harm to plaintiff.

Da18.

Appellants concede that the applicable standard by which we must review the findings of the district court when sitting without a jury is the "clearly erroneous" standard contained in Rule 52(a) of the Federal Rules of Civil Procedure. *See Pullman-Standard v. Swint*, 456 U.S. 273, 287, 102 S.Ct. 1781, 1789, 72 L.Ed.2d 66 (1982). Appellants thus bear the heavy burden of convincing us that the district court determinations either "is completely devoid of minimum evidentiary support displaying some hue of credibility," or "bears no rational relationship to the supportive evidentiary data." *Krasnov v. Dinan*, 465 F.2d 1298, 1302 (3d Cir.1972).

The appropriate standard of care owed by prison custodians in New Jersey with respect to the risk of in mate injury was set forth in *Harris v. State*, 61 N.J. 585, 297 A.2d 561 (1972). As the court stated there, a prisoner is owed "a duty of due care while in custody" and further, "in appropriate circumstances [the prisoner] would be entitled to a recovery on a showing that a prison official negligently failed to discharge his responsibility for the [prisoner's] care with resulting injuries to him." *Id.* at 590, 297 A.2d at 563. The *Harris* court denied recovery because the defendants had received no warning of a danger to the plaintiff. In this case, the district court found that the defendants had "actual notice of the threat by an inmate with a known history of violence," Da18, which we find satisfies the *Harris* notice requirement. *See also* Restatement (Second) of Torts § 320 (1965).

Appellants challenge the district court findings as clearly erroneous on several grounds. They contend that the district court erred in finding that they knew about McMillian's past, that they failed to exercise reasonable care to protect Davidson, and that their failure to follow the prison procedures proximately caused the injury. However, while we agree that on this record there would be room for the trier of

fact to have reached a different conclusion as to negligence, we cannot hold that there was no negligence as a matter of law nor that we are "left with the definite and firm conviction that a mistake has been committed" by the district court in reaching its findings. *United States v. U.S. Gypsum Co.*, 333 U.S. 364, 394, 68 S.Ct. 525, 542, 92 L.Ed. 746 (1948). Thus we accept the determination that defendants were negligent in failing to take steps to prevent McMillian's assault on Davidson.

III.

[3] Appellants argue that the district court erred as a matter of law when it identified a "liberty interest" protected by the Due Process Clause to be free from physical attack and injury. Since § 1983, by its own terms, provides redress only when state employees infringe those rights "secured by the Constitution and laws" of the United States, *see, e.g., Paul v. Davis*, 424 U.S. 693, 700-01, 96 S.Ct. 1155, 1160, 47 L.Ed.2d 405 (1976); *Smith v. Sperna*, 477 F.2d 1140, 1143 (3d Cir.1973), plaintiff must satisfy this threshold requirement before we need reach the question whether simple negligence can give rise to § 1983 liability. *See Baker v. McCollan*, 443 U.S. 137, 140, 99 S.Ct. 2689, 2692, 61 L.Ed.2d 433 (1979). We must, therefore, decide whether plaintiff as a state prisoner had a constitutionally protected "liberty interest" in security from physical assault by fellow prisoners.

The constitutional right on which Davidson relies is that of his liberty interest in personal security, protected by the Fourteenth Amendment. That the amendment covers such a basic personal right was affirmed by the Supreme Court in *Ingraham v. Wright*, 430 U.S. 651, 673, 97 S.Ct. 1401, 1413, 51 L.Ed.2d 711 (1977), where it stated, "Among the historic liberties [protected by the due process clause] was a right to be free from, and to obtain judicial relief for, unjustified intrusions on personal security."

Davidson's status as a prisoner does not deprive him of his right to rely on the Fourteenth Amendment. Because an inmate is not free to leave the confines which s/he is forced to share with other prisoners, the state incurs the responsibility for the inmate's safety. Undeniably, a similar responsibility stemming from the state's control over the plaintiff underlies the Court's finding of a liberty interest in *Ingraham*, where the plaintiff was in a public school, in *Youngberg v. Romeo*, 457 U.S. 307, 102 S.Ct. 2452, 73 L.Ed.2d 28 (1982), where the plaintiff was an inmate in a state institution for the mentally retarded, and in *City of Revere v. Massachusetts General Hospital*, 463 U.S. 239, 103 S.Ct. 2979, 2988, 77 L.Ed.2d 605 (1983), where the plaintiff was injured while being apprehended by the police. "The Supreme Court has 'repeatedly held that prisoners are not beyond the reach of the Constitution.' *Hudson v. Palmer*, — U.S. —, —, 104 S.Ct. 3194, 3198, 82 L.Ed.2d 393 (1984). As it recently stated, '[W]e have insisted that prisoners be accorded those rights not fundamentally inconsistent with imprisonment itself or incompatible with the objectives of incarceration.' *Id.*

This court held in *Curtis v. Everette*, 489 F.2d 516, 518 (3rd Cir.1973), *cert. denied*, 416 U.S. 995, 94 S.Ct. 2409, 40 L.Ed.2d 778 (1974), that the Due Process Clause is a valid basis for a prisoner's § 1983 action seeking relief for injuries inflicted by some other prisoner.[1] In *Curtis*, the allegation that defendant prison officials stopped the plaintiff prisoner from defending himself from an attack by another prisoner was

1. Other courts have treated a prisoner's § 1983 claim against prison officials for failure to protect against unjustified intrusions on personal security as raising an Eighth Amendment claim, *see, e.g., Wade v. Haynes*, 663 F.2d 778, 781 (8th Cir.1981), *aff'd on other grounds sub nom. Smith v. Wade*, 461 U.S. 30, 103 S.Ct. 1625, 75 L.Ed.2d 632 (1983); *Withers v. Levine*, 615 F.2d 158 (4th Cir.), *cert. denied*, 449 U.S. 849, 101 S.Ct. 136, 66 L.Ed.2d 59 (1980); *Clapper v. Flynn*, 605 F.2d 519 (10th Cir.1979); *Parker v. McKeithen*, 488 F.2d 955 (5th Cir.), *cert. denied*, 419 U.S. 838, 95 S.Ct. 67, 42 L.Ed.2d 65 (1974). Nothing in these opinions, however, suggests rejection of such a claim premised upon the Fourteenth Amendment. In *Holmes v. Gobles*, 615 F.2d 83 (2d Cir.1980), the court accepted a claim predicated on both bases.

hold to implicate the plaintiff's constitutional "right to be secure in his person" under the Fourteenth Amendment. *Id.*

Appellants argue that the substantive due process right to personal security does not protect a state prisoner from an isolated attack by another prisoner. In so arguing, appellants have confounded into one issue what are in fact two separate issues, whether the liberty interest in bodily integrity protected by the Fourteenth Amendment covers the state's failure to prevent attacks by other prisoners and the circumstances under which § 1983 provides a remedy for deprivation of that interest. Our focus in this section is directed only to the Fourteenth Amendment liberty interest.

As to that, we find no Supreme Court precedent that would limit the protected liberty interest in freedom from attack to those attacks inflicted by the state officials themselves. Certainly it would be absurd to argue that a state prisoner does not have a liberty interest that would be infringed were his or her state custodian deliberately to open the prison door knowing that a lynch mob converged outside. The state infringement would be no different if the prison guard had tied the rope around the prisoner's neck. The fact that there was only a single or isolated episode is irrelevant in determining whether a liberty interest was implicated.

That such a liberty interest covers attacks committed by persons other than state custodians has been recently affirmed in *Youngberg v. Romeo*, 457 U.S. 307, 102 S.Ct. 2452, 73 L.Ed.2d 28 (1982). Romeo, an involuntarily committed resident of a state institution for the mentally retarded, claimed in his § 1983 suit against administrators of the institution that his substantive right, *inter alia*, to safe conditions of confinement protected by the due process clause of the Fourteenth Amendment was violated because state officials were aware of and failed to take all reasonable steps to prevent his injury by other residents and by his own violence. The Court expressly recognized and reaffirmed the substantive liberty interest under the Fourteenth Amendment implicated by this claim. The Court stated:

> In the past, this Court has noted that the right to personal security constitutes a "historic liberty interest" protected substantively by the Due Process Clause. *Ingraham v. Wright*, 430 U.S. 651, 673 [97 S.Ct. 1401, 1413, 51 L.Ed.2d 711] (1977). And that right is not extinguished by lawful confinement, even for penal purposes. *See Hutto v. Finney*, 437 U.S. 678 [98 S.Ct. 2565, 57 L.Ed.2d 522] (1978).

Id. at 315, 102 S.Ct. at 2458. Thus we reject appellants' contention that Davidson had no interest protected by the Constitution.

IV.

The reasoning by which the district court concluded that Davidson was entitled to recover in this § 1983 action against Cannon and Jones is as follows: Cannon and Jones were negligent; as a result of that negligence, Davidson was injured; freedom from bodily injury is a liberty interest which is protected by the Fourteenth Amendment of the Constitution; New Jersey does not provide prisoners, such as Davidson, with a remedy in state court because it immunizes its employees against claims for injuries to a prisoner caused by another prisoner; ergo Davidson can recover under § 1983. We have noted our agreement with the district court's reasoning up to the step at which it concluded that § 1983 liability extends to the negligent conduct of the prison officials in failing to investigate or take other action to protect Davidson.[3] We turn now to that

3. An exegetic footnote in *Baker v. McCollan*, 443 U.S. 137, 140 n. 1, 99 S.Ct. 2689, 2692 n. 1, 61 L.Ed.2d 433 (1979), appears to distinguish between the question of defendant's state of mind as bearing on "whether a constitutional violation has occurred in the first place" and "whether § 1983 contains some additional qualification of that nature." Subsequent commentary has drawn a substantive distinction between the two questions. *See, e.g.*, S. Nahmod, Civil Rights & Civil Liberties Litigation § 3.02 (Supp. 1983). However in earlier cases, the Court

question, denominated as "elusive" by the Supreme Court. *Baker v. McCollan*, 443 U.S. 137, 140, 99 S.Ct. 2689, 2692, 61 L.Ed.2d 433 (1979).

There are literally hundreds of cases in the Courts of Appeals in which various aspects of this issue have arisen and no clearly discernible threat has evolved. As the Supreme Court has recognized, "The diversity in approaches [among the various federal courts] is legion." *Parratt v. Taylor*, 451 U.S. 527, 538, 101 S.Ct. 1908, 1913, 68 L.Ed.2d 420 (1981).[3] We begin, therefore, by examining the Supreme Court's own treatment of the issue.

Until the Court's decision in *Monroe v. Pape*, 365 U.S. 167, 81 S.Ct. 473, 5 L.Ed.2d 492 (1961), there was little case law dealing with violations of § 1983 since most of the civil rights litigation against state officers before that time involved 18 U.S.C. § 242, the criminal counterpart to § 1983. In *Monroe v. Pape*, the Court held, *inter alia*, that because § 1983, unlike § 242, does not contain the word "wilfully," proof of "wilfulness" should not be required of a plaintiff seeking recovery under § 1983. The Court defined "wilfully" as the doing of an act with "a specific intent to deprive a person of a federal right." *Id.* at 187, 81 S.Ct. at 484. Justice Harlan, who concurred, addressed the relationship between the state action encompassed in § 1983 and that covered under ordinary state tort law. He stated that one must attribute "to the enacting legislature the view that a deprivation of a constitutional right is significantly different from and more serious than a violation of a state right and therefore deserves a different remedy even though the same act may constitute both a state tort and the deprivation of a constitutional right." *Id.* at 196, 81 S.Ct. at 49 (emphasis added).

The language and scope of the holding of the subsequent Supreme Court cas considering this issue reflect the Court rejection of the notion that every state to committed by a state officer acting und color of state law is *ipso facto* converte into a violation of § 1983. Thus, for exam ple, in *Estelle v. Gamble*, 429 U.S. 97, 9 S.Ct. 285, 50 L.Ed.2d 251 (1976), the Cou held that a state prisoner subjected medical malpractice does not automatical have a claim under § 1983. The Cou stated, "Medical malpractice does not b come a constitutional violation merely b cause the victim is a prisoner. In order state a cognizable claim, a prisoner mu allege acts or omissions sufficiently harm ful to evidence deliberate indifference serious medical needs." *Id.* at 106, 97 S.C at 292.

In a case decided earlier that year, *Pa v. Davis*, 424 U.S. 693, 96 S.Ct. 1155, L.Ed.2d 405 (1976), the Court, speakin through Justice Rehnquist, held that a c son defamed by police through circulati of a flyer of "active shoplifters" on wh his name and photograph appeared did n state a claim for relief under § 1983 a the Fourteenth Amendment. The Cou expressly rejected the premise that "t Due Process Clause of the Fourteen Amendment and § 1983 make actionab many wrongs inflicted by government e ployees which had heretofore been thoug to give rise only to state-law tort claim *Id.* at 699, 96 S.Ct. at 1159. Justice Reh quist stated that such a premise "would unnecessary to pronouncements in our cases

expand the scope of § 1983 and the Fourteenth Amendment correspondingly. *See, e.g., Paul v. Davis*, 424 U.S. 693, 699, 96 S.Ct. 1155, 1159, 47 L.Ed.2d 405 (1976). For purposes of this case, the question whether negligent conduct by state officials is a deprivation of Fourteenth Amendment rights and whether it can be redressed by suit under § 1983 appear to be mirror images of each other.

4. The academic commentary has also been disorganized by its diversity of opinion. *See, e.g.*, Kirkpatrick, *Defining a Constitutional Tort: Section 1983, The State-Of-Mind Requirements*, 46 U.Cin.L.Rev. 45 (1977); McClellan, *Damages for Violations of Constitutional Rights*, 18 Drake L.Rev. (1968); Whitman, *Constitutional Torts*, 79 Mich. L.Rev. 5 (1980); Note, *Basis of Liability in Section 1983 Suit: When is the State-Of-Mi Analysis Relevant?* 57 Ind.L.J. 459 (1982); N *Section 1983 Liability for Negligence*, 58 Yale Rev. 271 (1970); Note, *A Theory of Negligen for Constitutional Torts*, 92 Yale L.J. 683 (19

more than one occasion with respect to the scope of § 1983 and of the Fourteenth Amendment." *Id.*

The authority on which Justice Rehnquist relied was *Screws v. United States*, 325 U.S. 91, 65 S.Ct. 1031, 89 L.Ed. 1495 (1945), where Justice Douglas had written for the plurality:

> Violation of local law does not necessarily mean that federal rights have been invaded. The fact that a prisoner is assaulted, injured, or even murdered by state officials does not necessarily mean that he is deprived of any right protected or secured by the Constitution or laws of the United States.

Id. at 108–09, 65 S.Ct. at 1049, *quoted in Paul v. Davis*, 424 U.S. at 700, 96 S.Ct. at 1160. Justice Douglas' opinion in *Screws* continued with the caution that Congress should not be understood to have attempted

> to make all torts of state officials federal crimes. It brought within [the criminal provision] only specified acts done 'under color' of law and then only those acts which deprived a person of some right secured by the Constitution or laws of the United States.

325 U.S. at 108, 65 S.Ct. at 1050, also *quoted in Paul v. Davis*, 424 U.S. at 700, 96 S.Ct. at 1160. Although Justice Douglas in *Screws* was construing the criminal analogue to § 1983, those passages of the *Screws* opinion were used as applicable authority by the majority in *Paul v. Davis* in its interpretation of § 1983. Indeed, Justice Rehnquist then proceeded to apply the analysis from *Screws* to reject the claim that defamation by the police fell within the scope of § 1983 and of the Fourteenth Amendment. Justice Rehnquist wrote:

> [Plaintiff] apparently believes that the Fourteenth Amendment's Due Process Clause should *in propria vigore* extend to him a right to be free of injury wherever the State may be characterized as the tortfeasor. But such a reading would make of the Fourteenth Amendment a font of tort law to be superimposed upon whatever systems may already be administered by the States. We have noted the "constitutional shoals" that confront any attempt to derive from congressional civil rights statutes a body of general federal tort law, *Griffin v. Breckenridge*, 403 U.S. 88, 101–102 [91 S.Ct. 1790, 1797–1798, 29 L.Ed.2d 338] (1971); *a fortiori*, the procedural guarantees of the Due Process Clause cannot be the source for such law.

Paul v. Davis, 424 U.S. at 701, 96 S.Ct. at 1160.

Shortly thereafter, in *Procunier v. Navarette*, 434 U.S. 555, 98 S.Ct. 855, 55 L.Ed.2d 24 (1978), the Supreme Court appeared ready to decide directly the issue before us since it granted certiorari to consider "[w]hether negligent failure to mail certain of a prisoner's outgoing letters states a cause of action under section 1983." *Id.* at 559 n. 6, 98 S.Ct. at 858 n. 6. Because the Court decided that the defendants were entitled to prevail on the defense of qualified immunity as a matter of law, it did not reach the question on which certiorari was granted.

Thereafter, in *Baker v. McCollan*, 443 U.S. 137, 99 S.Ct. 2689, 61 L.Ed.2d 433 (1979), the Court again confronted this question. Again, the Court disposed of the case on other grounds since it held that no constitutional right was implicated because the defendant police officer charged with false imprisonment under § 1983 had acted on the basis of a valid arrest warrant. However, in his discussion concerning whether negligent conduct can form the basis of an award of damages under 42 U.S.C. § 1983, Justice Rehnquist, once more writing for the Court, stated:

> Having been around this track once before in *Procunier*, *supra*, we have come to the conclusion that the question whether an allegation of simple negligence is sufficient to state a cause of action under § 1983 is more elusive than it appears at first blush. It may well not be susceptible of a uniform answer across the entire spectrum of conceivable

constitutional violations which might be the subject of a § 1983 action.

Id. at 139–40, 89 S.Ct. at 2005.

The duty upon which liability was sought to be predicated in *Baker v. McCollan* was closely akin to that Davidson relies on here. Plaintiff McCollan had been falsely imprisoned because his brother, the real culprit, had used plaintiff's driver's license as his identification. The Court of Appeals held that plaintiff's complaint stated a claim for relief under § 1983 because under tort law "the sheriff or arresting officer has a duty to exercise due diligence in making sure that the person arrested and detained is actually the person sought under the warrant and not merely someone of the same or a similar name. *See* Restatement (2d) Torts § 135, comment c(i) (1965)." *McCollan v. Tate*, 573 F.2d 952, 513 (5th Cir. 1978). Thus in *McCollan*, as in this case, plaintiff's claim was based on allegations under tort law of those state officials who have custody of prisoners.

The Supreme Court, in reversing the Court of Appeals decision, rejected the contention that the duty imposed by tort law would be automatically transmuted into a duty protected by the Constitution. Justice Rehnquist stated:

> Section 1983 imposes liability for violations of rights protected by the Constitution, not for violations of duties of care arising out of tort law. Remedy for the latter type of injury must be sought in state court under traditional tort-law principles. Just as "[m]edical malpractice does not become a constitutional violation merely because the victim is a prisoner," *Estelle v. Gamble*, 429 U.S. 97, 106 [97 S.Ct. 285, 292, 50 L.Ed.2d 251] (1976), false imprisonment does not become a violation of the Fourteenth Amendment merely because the defendant is a state official.

Id. 440 U.S. at 146, 99 S.Ct. at 2693–2694.

Thus, nothing in the Court's cases through 1979 provides any support for the principle that negligent conduct by a state official causing injury to the person constitutes a deprivation of a Fourteenth Amendment right which can be redressed in a § 1983 suit. As authority for that point the district court read the Supreme Court opinion in *Parratt v. Taylor*, 451 U.S. 527, 101 S.Ct. 1908, 68 L.Ed.2d 420 (1981), holding "that a state official's negligence is sufficient to constitute a 'deprivation' for due process purposes." Da20. We turn now to *Parratt* to determine if it supports the broad construction given it by the district court.

In *Parratt* the plaintiff prisoner brought an action claiming that his new hobby materials valued at $23.50 were negligently lost by prison officials in violation of his right under the Fourteenth Amendment not to have his property taken without due process of law. Plaintiff's claim was ultimately rejected by the Supreme Court, which held that because there were state remedies that could have fully compensated plaintiff for the property loss he suffered, the requirements of due process had been satisfied. 451 U.S. at 537–44, 101 S.Ct. at 1913–17. Recently, in *Hudson v. Palmer*, — U.S. —, 104 S.Ct. 3194, 82 L.Ed.2d 393 (1984), the Court extended the *Parratt* holding to apply as well to certain intentional deprivations of a prisoner's property. It stated,

> [W]e hold that an unauthorized intentional deprivation of property by a state employee does not constitute a violation of the procedural requirements of the Due Process Clause of the Fourteenth Amendment if a meaningful postdeprivation remedy is available. For intentional as for negligent deprivations of property by state employees, the State's action is not complete until and unless it provides or refuses to provide a suitable postdeprivation remedy.

Id. 104 S.Ct. at 3204. (emphasis added)

The holdings of *Parratt* and *Hudson* that the available state postdeprivation remedies provide adequate procedural due process do not meet the substantive due process issue presented in this case. However, in *Parratt*, before reaching the procedural due process issue Justice Rehnquist

writing for the Court, considered the scope of § 1983, and wrote:

> Nothing in the language of § 1983 or its legislative history limits the statute solely to *intentional* deprivations of constitutional rights. In *Baker v. McCollan* [443 U.S. 137, 99 S.Ct. 2689, 61 L.Ed.2d (1979)], we suggested that simply because a wrong was negligently as opposed to intentionally committed did not foreclose the possibility that such action could be brought under § 1983 .... Section 1983, unlike its criminal counterpart, 18 U.S.C. § 242, has never been found by this Court to contain a state-of-mind requirement. The Court recognized as much in *Monroe v. Pape*, 365 U.S. 167 [81 S.Ct. 473, 5 L.Ed.2d 492] (1961) ....
>
> Both *Baker v. McCollan* and *Monroe v. Pape* suggest that § 1983 affords a 'civil remedy' for deprivations of federally protected rights caused by persons acting under color of state law without any express requirement of a particular state of mind.

451 U.S. at 534-35, 101 S.Ct. at 1913-15 (footnote omitted).

Admittedly, this language standing alone is susceptible of the interpretation placed upon it by the district court that mere negligence can constitute a deprivation that can be redressed by a § 1983 action. However, in the context of the development of the law set forth above, we conclude *Parratt* does not so hold.

Most significant is that in the two earlier cases also authored by Justice Rehnquist, *Baker v. McCollan*, decided only two years before *Parratt*, and *Paul v. Davis*, the Court vigorously rejected the suggestion that traditional torts became constitutional violations when committed by state officials. It is implausible that the Court would make a major pronouncement that constituted a 180 degree turnabout as to the scope of substantive due process or § 1983 without discussion or analysis. This is particularly so because early in the *Parratt* opinion the Court specifically noted that it had "twice granted certiorari in cases to decide whether mere negligence will support a claim for relief under § 1983," 451 U.S. at 532, 101 S.Ct. at 1911 (citing *Procunier v. Navarette*, 434 U.S. 555, 98 S.Ct. 855, 55 L.Ed.2d 24 (1978) and *Baker v. McCollan*, 443 U.S. 137, 99 S.Ct. 2689, 61 L.Ed.2d 433 (1979)) and stated that "in each of those [the Court] found it unnecessary to decide the issue." *Id.* Had the Court intended to finally decide the issue in *Parratt* that it had expressly left open previously, it is reasonable to expect that it would have done so affirmatively.

Instead, what the Court did was reiterate the statements in *Monroe v. Pape* and *Baker v. McCollan* that § 1983 was not limited to intentional deprivation of constitutional rights. That proposition is not the obverse of one stating that § 1983 encompasses suits for negligence by state officials, because there is a broad range of action between the two poles. Indeed, Justice Powell, concurring in the result in *Parratt*, observed that the Court "passe[d] over the threshold question—whether a negligent act by a state official ... constitutes a deprivation of property for due process purposes." *Id.* 451 U.S. at 547, 101 S.Ct. at 1919. Thus, nothing in the Court's opinion in *Parratt* leads us to conclude that the Court held that merely negligent conduct by state officers constitutes a constitutional deprivation encompassed by § 1983.

[3] Of course, the absence of any conclusive Supreme Court holding that requires us to construe § 1983 as encompassing all claims for negligence does not necessarily foreclose that interpretation. However, our own court's opinions, as well as precedent from other circuits that we find persuasive, have concluded that negligence claims are not encompassed within § 1983. We reaffirm that conclusion, in large measure because of what we view as the purpose and essence of § 1983.[5]

5. The Civil Rights Acts of 1870 and 1871, codified today as 42 U.S.C. §§ 1981, 1982, 1983, 1985, and 1986 were enacted to enforce the newly ratified Civil War Amendments in the hostile southern states. As Justice Harlan said in his dissent in the *Civil Rights Cases*, 109 U.S.

[4] The essential element of a § 1983 action is shown by a state official of his or her official position. *Monroe v. Pape*, 365 U.S. at 172, 81 S.Ct. at 476. Justice Stevens has explained that "Section 1983 focuses on '[m]isuse' of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law." *Parratt v. Taylor*, 451 U.S. at 717, 68 S.Ct. at 1160 (dissenting opinion) (emphasis in original) (quoting *United States v. Classic*, 313 U.S. 299, 326, 61 S.Ct. 1031, 1043, 85 L.Ed. 1368 (1941)).

In *Ward v. Procunier*, 835 F.2d 498 (3d Cir. 1987) (opportunely discussed by Justice Powell in his separate opinion in *Parratt*, 451 U.S. at 550-51, 101 S.Ct. at 1920-21), we held that a tort committed by a state official acting under color of state law is not, in and of itself, sufficient to show an invasion of a person's constitutional rights under § 1983. That position was reiterated in a subsequent series of cases. *See Black v. Stephens*, 662 F.2d 181, 188 (3d Cir. 1981), *cert. denied*, 455 U.S. 1008, 102 S.Ct. 1648, 71 L.Ed.2d 876 (1982); *Smith v. Ignas*, 677 F.2d 1140, 1143 (3d Cir.1979); *Maxwell v. Cassidy*, 664 F.2d 272, 277 (3d Cir. 1972); *Nicolas v. Rundle*, 459 F.2d 989 (3d Cir.1972). As we said in *Rhodes v. Robinson*, 612 F.2d 766, 772 (3d Cir.1979), "Where a person suffers injury as an incidental and unintended consequence of official actions, the abuse of power contemplated in the due process and [eighth] amendments does not exist."[6]

Y unless other courts since *Parratt* ha also agreed that simple negligence does suffice to state a claim under § 1983. *Hall v. City of Owensville*, 679 F.2d 6 (8th Cir.1982) (concurring *P* rent); *Wilder v. Swenick*, 666 F.2d 327, 34 2 (8th Cir.1981) (per curiam) (concurs *Parratt*). *But see Bonner v. Perrin* ng, 720 F.2d 1264, 1269 n. 8 (11th Cir.19 *McKay v. Rhodes*, 706 F.2d 1387, 1 (10th Cir.1984).

[5,6] A construction that § 1983 d not encompass negligent actions does restrict its function as the primary veh to provide redress for unconstitutional tion by state employees that violates constitution.[7] We realize, prescribing comprehensive limits test to determ which actions are or are not within § 19 particularly since such a test has no eluded the Supreme Court, but the past emerges from earlier cases.

[7] Application of force by police c ers or prison guards exceeding that wh is reasonable and necessary under the circumstances states a claim under § 19 *Black v. Stephens*, 662 F.2d at 188; *Rho v. Cassidy*, 464 F.2d at 282; *Martinez Rundle*, 614 F.2d 939 (3d Cir.1980). Si larly, if the officials encouraged others use excessive force, the officials would

1. 44, 3 S.Ct. 18, 45, 27 L.Ed. 835 (1883), the overriding purpose of these amendments was to ensure "the freedom of the slave race, the security and firm establishment of that freedom, and the protection of the newly-made freemen and citizen from the oppression of those who had formerly exercised unlimited dominion over him" (quoting *The Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 21 L.Ed. 394 (1872)). Section 1983 originated as § 1 of the Act of April 20, 1871, 17 Stat. 13, and "was passed by a Congress that had the Klan particularly in mind." *Monroe v. Pape*, 365 U.S. at 174, 81 S.Ct. at 477 (quoting Randall, The Civil War and Reconstruction, 807 (1937)). Referring frequently to a 600-page report documenting outrages against blacks that had gone unpunished, the 42d Congress sought a remedy "against those who represent a State in some capacity were unable or unwilling to enforce a state law." *Id.* at 176, 81 S.Ct. at 478 (Court's emphasis).

6. As our analysis of *Parratt* shows, the s ment in *Robinson v. Allen*, 712 F.2d 854 Cir.1983), reading *Parratt* as holding "in a ited manner, that § 1983 affords a remedy negligent deprivation of federally guar rights by persons acting under the color of s law," *id.* at 856, is too broad. It was, in event, unnecessary to the holding of the that the established state procedures in ques lated due process.

7. Although in this case we deal with due pro violations under the Fourteenth Amendm the constitutional deprivations supporting § 1 recoveries is not limited to due process. *e.g. Brown v. Southworth*, 611 F.2d 466 (1st 1979) (discharge for exercise of First Am ment rights); *Tilson v. Wilkins*, 620 F.2d 160 Cir.1980) (early search for traffic violation (rogue Fourth Amendment).

liable. *See Black v. Stephens*, 662 F.2d at 189 (alternative basis for liability against police chief was policy of encouraging police officers to use excessive force).

[8] Liability under § 1983 may be imposed on prison officials even when the assault has been committed by another prisoner, if there was intentional conduct, deliberate or reckless indifference to the prisoner's safety, or callous disregard on the part of prison officials. *See Wade v. Haynes*, 663 F.2d 778, 783-84 (8th Cir. 1981), *aff'd en other grounds sub nom. Smith v. Wade*, 461 U.S. 30, 103 S.Ct. 1625, 75 L.Ed.2d 632 (1983) (verdict sustained against correctional officers and the superintendent of the reformatory for placing the prisoner in a dangerous situation in which it was highly foreseeable that the assault would occur); *Holman v. Gobles*, 718 F.2d 92, 96 (6th Cir.1983) (prisoner assaulted by another prisoner entitled to an opportunity "to show purposeful acts on the part of the correction officers or deliberate indifference to his safety amounting to a violation of due process."). This is consistent with our holding in *Curtis v. Everette*, 489 F.2d at 518, that allegations by a prisoner of "intentional conduct" by prison officials who stopped him from defending himself when assaulted by another prisoner stated a § 1983 claim.

Other cases provide examples of conduct beyond mere negligence that fall within the scope of § 1983. In *Stokes v. Delcambre*, 710 F.2d 1120, 1124 (6th Cir.1983), the court held that "the jury could have concluded that the jail was administered in a manner virtually indifferent to the safety of prisoners" and that under those facts, the defendants would be held to have violated the prisoners' constitutional rights, whether expressed in Fifth or Eighth Amendment terms. Moreover, when officials with a responsibility to prevent harm, such as prison officials, fail to establish or exercise appropriate procedures for preventing serious malfunctions in the administration of justice, such failure would support a claim under § 1983. *See, e.g., Murray v. City of Chicago*, 634 F.2d 366 (7th Cir.1980), *cert. dismissed sub nom. Finley v. Murray*, 450 U.S. 964, 101 S.Ct. 1529, 67 L.Ed.2d 809 (1981). Similarly, a regulation issued by the Police Chief delaying disciplinary hearings against police officers until adjudication of the underlying arrest charges which caused officers to file unwarranted charges against plaintiff fell within § 1983, *Black v. Stephens*, 662 F.2d at 189-90.

[9] Another vital area in which § 1983 plays an effective role is in providing a federal forum to challenge an established state procedure that infringes upon an individual's liberty or property interests, such as the Illinois procedure by which a claim could be terminated through no fault of the claimant declared invalid in *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 102 S.Ct. 1148, 71 L.Ed.2d 265 (1982), or the New Jersey statute prohibiting prisoners from bringing tort actions against public entities or employees while confined struck down in *Skinner v. Hilton*, 712 F.2d 654 (3d Cir.1983).

[10] We thus reaffirm that actions may be brought in federal court under § 1983 when there has been infringement of a liberty interest by intentional conduct, gross negligence or reckless indifference, or an established state procedure.[6] The viability of such § 1983 actions does not depend on whether or not a postdeprivation remedy is available in state court. We do not read anything to the contrary in the holdings in *Parratt* and *Hudson*, which concerned a prisoner's property right. It is conceivable that the Court intended in those cases to subject all suits for unconstitutional acts under color of law, including those implicating a liberty or life interest, to a state remedy, if available. Such an interpretation would deprive § 1983 of its original remedial purpose to "aid [in] the preservation of human liberty and human rights".

6. Judges Wisdom and Garth do not believe that this case presents the case of gross negligence and do not pass on the reference to it.

...ure remarks of Representative Shellabarger during the Congressional debates surrounding the passage of the forerunner of § 1983, quoted in *Owen v. City of Independence*, 445 U.S. 622, 636, 100 S.Ct. 1398, 1408, 63 L.Ed.2d 673 (1980), and would reduce its scope to the mere instances where the state has foreclosed a remedy, as here. The Court has repeatedly declined to require exhaustion of state remedies for § 1983 actions. *See Patsy v. Florida Board of Regents*, 457 U.S. 496, 500, 102 S.Ct. 2557, 2559-60, 73 L.Ed.2d 172 (1982); *Stefkel v. Thompson*, 415 U.S. 452, 473-74, 94 S.Ct. 1209, 1222, 39 L.Ed.2d 505 (1974) ("When federal claims are presented in [§ 1983] we have not required exhaustion of state judicial or administrative remedies"). We read *Parratt* and *Hudson* as decided in the context of prisoners' interests in their personal property which were fully redressable by the available state remedies.

In contrast, at issue here is a liberty interest. In determining whether behavior deprives the plaintiff of a substantive Fourteenth Amendment liberty interest, we must again focus on what constitutes due process. As the Supreme Court stated in *Poelker v. Connecticut*, 392 U.S. 519, 520, 88 S.Ct. 149, 1521, 20 L.Ed. 589 (1967), the Due Process Clause imposes requirements of decency and fairness because they are "implicit in the concept of ordered liberty". In *Rochin v. California*, 342 U.S. 165, 72 S.Ct. 205, 96 L.Ed. 183 (1952), the Court described a violation of substantive rights under the Due Process Clause as "conduct that shocks the conscience." *Id.* at 172, 72 S.Ct. at 209. The Court did not say what or anything less would suffice, and it refused to formulate a test: "Due process law, as a historic and generative principle, precludes defining, and thereby confining, these standards of conduct more precisely than to say that convictions cannot be brought about by methods that offend 'a sense of justice.'" *Id.* at 173, 72 S.Ct. at 210.

[11] The conduct of the two prison officials here fails to rise to that level. Officer Davidson followed the established procedure in diverting Davidson to the proper office but he simply failed to follow up. Jamison, who was operating under a double shift burden, merely forgot to investigate a prisoner's note, which was ambiguous as to the nature of the threat, and conveyed a sense of urgency. What the only findings show is that of mere negligence, as here, cannot find the "outrageousness" or abuse of official power that warrants raising the tortious conduct of the prison official to the level of a deprivation of constitutional rights within the scope of § 1983. *Accord Brown v. Brewer*, 669 F.2d 1297, 1298 (8th Cir.1982) (per curiam) (Eighth Amendment); *Williams v. Ealing*, 624 F.2d 696, 697-98 (5th Cir.1980) (Fourteenth Amendment), *cert. denied*, 450 U.S. 1019, 101 S.Ct. 30, 66 L.Ed.2d 581 (1981).

In summary, we hold that § 1983 retains its central role in affording remedies to victims of constitutional deprivation, but that such a role does not extend to providing a remedy for the type of negligence found in this case.[3]

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[3] Our holding avoids the anomalies that would result were a prisoner's § 1983 suit such as this under the Fourteenth Amendment to be judged under a lesser standard of care than the deliberate indifference standard applicable to a prisoner's Eighth Amendment claim, *see Estelle v. Gamble*, 429 U.S. 97, 97 S.Ct. 285, 50 L.Ed.2d 251 (1976), or were a prisoner to be required under the Constitution to a higher standard of care than an involuntarily committed mental patient, *see Youngberg v. Romeo*, 457 U.S. 307, 102 S.Ct. 2452, 73 L.Ed.2d 28 (1982).

Some members of this court believe that in circumstances such as those presented here, the Eighth Amendment standard is the same as that of the substantive due process clause of the Fourteenth Amendment, and that consistency demands that the Fourteenth Amendment generally conform the Eighth Amendment's mens rea. *See Williams v. Mazzoccoli*, 722 F.2d 1128, 1130-34 (3d Cir.1983). *See also Rhodes v. Robinson*, 612 F.2d 766 (3d Cir.1979) (discussion of opinions applying similar standards in cases arising under the two amendments).

However, other members of the court believe the standard for liability under § 1983 "is well can be susceptible of a uniform application across the entire spectrum of conceivable constitutional violations which might be the subject of a § 1983 action." *See Baker v. McCollan*, [illegible]

V.

[12] Davidson has suggested that his claim should be viewed as one of deprivation of procedural due process. His contention appears to be that when New Jersey enacted the statute foreclosing suit by a prisoner against either the state or a prison employee for injuries suffered by another prisoner, N.J.Stat.Ann. 59:5-2(b)(4) (West 1982), it violated his right to procedural due process. For a number of reasons we reject this claim.

In the first place, plaintiff here, unlike the plaintiff in *Holman v. Hilton*, 712 F.2d 854 (3d Cir.1983), has not challenged the constitutionality of the statute. Plaintiff's claim, instead, is only for money damages from the defendants for the injuries inflicted by the assault.

[13] In the second place, a claim for procedural due process must be predicated on deprivation of a substantive right or interest created by the Constitution, a statute or other entitlement. *Bishop v. Wood*, 426 U.S. 341, 344, 96 S.Ct. 2074, 2077, 48 L.Ed.2d 684 (1976); *Meachum v. Fano*, 427 U.S. 215, 96 S.Ct. 2532, 49 L.Ed.2d 451 (1976). Since we have rejected Davidson's claim that his substantive right under the Fourteenth Amendment was deprived by defendants' negligence, and there has been no claim of a statutory or other entitlement, there is nothing to trigger an inquiry into what process is due.

[14] In any event, nothing in the Constitution insures that a putative plaintiff may maintain a particular type of negligence claim in state court. The tradition of immunity was firmly rooted before the passage of § 1983. *See Owen v. City of Independence*, 445 U.S. 622, 637-38, 100 S.Ct. 1398, 1409-09, 63 L.Ed.2d 673 (1980). In *Martinez v. California*, 444 U.S. 277, 281-83, 100 S.Ct. 553, 557-58, 62 L.Ed.2d 481 (1980), the Court rejected the claim that a state statute which foreclosed a tort suit established a federal constitutional violation. In sustaining the dismissal of a § 1983 action brought for death caused by a released parolee, the Court held constitutional a state statute similar to that here providing all public entities and public employees with immunity from liability for their action in releasing a parolee.

Nor do we find any merit in plaintiff's argument which seeks to distinguish between previously existing immunities and those recently created. As the Court stated in *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 432, 102 S.Ct. 1148, 1156, 71 L.Ed.2d 265 (1982):

> the State remains free to *create* substantive defenses or immunities *for* use in adjudication—or to eliminate its statutorily created causes of action altogether—just as it can amend or terminate its welfare or employment programs.

(emphasis supplied). The Court explained in *Parratt v. Ackerman*, 444 U.S. 193, 198, 100 S.Ct. 402, 406, 62 L.Ed.2d 335 (1979), "For when a state law creates a cause of action, the State is free to define the defenses to that claim, including the defense of immunity, unless, of course, the state rule is in conflict with federal law." *See Daniels v. Williams*, 720 F.2d 792, 796 (4th Cir.1983).

The implication of Davidson's procedural due process claim is almost unlimited. It would subject to procedural due process scrutiny every state decision to immunize a public entity and employee from discrete claims, *see, e.g.*, N.J.Stat.Ann. 59:4-6, (creating immunity from liability caused by the plan or design of public property). Davidson has provided no authority to support such a far reaching extension of procedural due process,[18] and the available authority, as stated above, is to the contrary.

U.S. at 139-40, 97 S.Ct. at 2692. Because the district court in this case found that there was no Eighth Amendment violation, and no cross-appeal has been filed, the Eighth Amendment issue is not before us.

18. The New Jersey provision struck down in *Holman v. Hilton*, 712 F.2d 854 (3d Cir.1983), did not create a substantive defense but instead precluded a prisoner from asserting the cause of action to which s/he was entitled until the prisoner was released from prison. *Id.* at 857-58. That holding is not jeopardized by this opinion.

VI.

For the foregoing reasons we will reverse the judgment of the district court and direct entry of judgment for defendants.

GARTH, Circuit Judge, concurring, with whom WEIS, Circuit Judge, joins: [1]

Although I have joined Judge Sloviter's majority opinion, I write separately to express my view that even if mere negligence could constitute a deprivation of Davidson's liberty interest (a proposition with which I do not agree) there is no requirement or reason that a remedy must be provided by 1983 in federal court. Stated differently, just because no remedy is available to Davidson under state law, it does not follow that *some* remedy must be made available *somewhere*—and that therefore the remedy in this case must be a constitutionalized remedy under 1983. I suggest that only an incomplete analysis can reach such a result and that if an appropriate procedural due process analysis is employed,[2] the result in this case will be no different than the result at which the majority opinion has arrived by distinguishing between property and liberty interests. In both circumstances, Davidson still cannot prev over the State and its officials.

I.

If New Jersey, as it has here, provi immunity against Davidson's claim, theo appropriate due process analysis should concerned with whether the state's inter in protecting its prison officials in suc situation outweighs Davidson's interest having available a monetary cause of tion against prison officials for merely n ligent conduct. The particular balance be struck must measure the state's inter in crafting its own tort laws and immu ties against Davidson's interest in havi more extensive remedies than those affo ed by state law.[3]

In a similar context, the Supreme Co has written that "even if one characteri the immunity defense as a statutory de vation, it would remain true that the stat interest in fashioning its own rules of t law is paramount to any discernible fede interest, except perhaps an interest in p tecting the individual citizen from state tion that is wholly arbitrary or irrationa *Martinez v. California*, 444 U.S. 277, 2 100 S.Ct. 553, 557, 62 L.Ed.2d 481 (198

1. Both Judge Weis and Judge Garth join the majority opinion.

2. As the majority opinion correctly states (Maj. Op. at page 330) a claim for procedural due process arises only after a deprivation of some substantive right or interest created by the Constitution, by statutes, or by other entitlements. *Bishop v. Wood*, 426 U.S. 341, 344, 96 S.Ct. 2074, 2077, 48 L.Ed.2d 684 (1976); *Meachum v. Fano*, 427 U.S. 215, 96 S.Ct. 2532, 49 L.Ed.2d 451 (1976). Because the majority of this court has rejected Davidson's claim that his substantive right under the Fourteenth Amendment was deprived by the defendants' negligence, the majority opinion had no occasion to consider a procedural due process analysis. I would not do so either were it not for the position taken by our colleagues, who are not in the majority that a procedural due process analysis would provide Davidson with a 1983 action in federal court and would thus lead to a result contrary to the result reached by the majority.

For purposes of this discussion, therefore, I will assume that mere negligence by state officials could constitute a deprivation of David- son's liberty interests. However, it does not follow from this assumption that the remedy m be provided in federal court pursuant to sect 1983. To hold that negligent conduct by a s official serves to convert duties imposed by s tort law into substantive constitutional vi tions which lay the necessary predicate fo procedural due process inquiry is not a re compelled by *Parratt v. Taylor*, 451 U.S. 527, S.Ct. 1908, 68 L.Ed.2d 420 (1981).

3. There is analogous precedent for this type balancing of interests where immunity has b upheld in a variety of circumstances. See *Ha ow v. Fitzgerald*, 457 U.S. 731, 102 S.Ct. 2690, L.Ed.2d 396 (1982) (President is absolutely i mune from suit); *Butz v. Economou*, 438 U 478, 513–14, 98 S.Ct. 2894, 2914–15, 57 L.Ed 895 (1978) (Administrative Law Judge employ by Executive Branch absolutely immune fr prosecution); *Imbler v. Pachtman*, 424 U.S. 4 420–28, 96 S.Ct. 984, 990–94, 47 L.Ed.2d (1976) (prosecutor absolutely immune from bility for decision to initiate prosecution); *P son v. Ray*, 386 U.S. 547, 553–55, 87 S.Ct. 1 1217–18, 18 L.Ed.2d 288 (1967) (state municip judge absolutely immune from prosecution der section 1983).

In *Martinez*, the court held that a California statute, which granted absolute immunity to public employees responsible for parole-release decisions, was not an unconstitutional deprivation of due process when applied to defeat a tort claim arising under state law.

Nor should *Parratt v. Taylor*, 451 U.S. 527, 101 S.Ct. 1908, 68 L.Ed.2d 420 (1981) be read to constrain a state's ability to establish its own substantive rules of law when such rules create no conflict with federal law. *See Ferri v. Ackerman*, 444 U.S. 193, 198, 100 S.Ct. 402, 406, 62 L.Ed.2d 355 (1979). In *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 432, 102 S.Ct. 1148, 1155, 71 L.Ed.2d 265 (1982), the court reiterated that "the state remains free to create substantive defenses or immunities for use in adjudication—or to eliminate its statutorily created causes of action altogether—just as it can amend or terminate its welfare or employment programs."

No authority has been called to my attention that supports the conclusion that a state's immunity statute must inelectably lead to a denial of due process such that section 1983 must be expanded to encompass negligence actions. The absence of a particular state remedy cannot, without more, require that a federal remedy be provided.[4] In terms of a procedural due process analysis, it then must be determined "what process is due" Davidson. The Fourth Circuit in *Daniels v. Williams*, 720 F.2d 792 (4th Cir.1983) held that a state may plead sovereign immunity as an affirmative defense. In that case the plaintiff would have received procedural due process when and even though the state's affirmative defense was sustained. Here, even if we were to assume that the negligence of the defendants, Cannon and James, amounted to a "deprivation of liberty," consideration must be given to the state's strong interest in protecting its prison officials from liability.

Such decisions require an inherently delicate determination, a determination which would balance prison order and safety against an individual's traditional desire to obtain a monetary response for injury suffered through a negligent act. *Cf. Harlow v. Fitzgerald*, 457 U.S. 800, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982) (creating qualified immunity for public officials performing discretionary functions). Thus, in this instance, if the balance is struck in favor of the state as I suggest it must be, Davidson has had all the process which is his due. This being so, there is no requirement that Davidson be assured a cause of action against the state or the state's officers for arguably negligent conduct, let alone a 1983 action in federal court. This does not mean, of course, that Davidson may not pursue any claim that he may have against McMillan, the prisoner who actually attacked him.

Accordingly, I suggest that those who advocate a federal constitutional remedy by default (where no state remedy is available) have failed to consider and to balance the state's interest against the interest asserted by the claimant. In failing to do so, they have also failed to recognize that a state may afford appropriate due process without that process necessarily resulting in a recovery for the claimant.[5] *See, e.g.*,

4. Were an absolute grant of immunity, precluding state tort suits, sufficient to establish a right to a federal remedy, a pedestrian negligently struck by a police car racing to apprehend a criminal, would be entitled to maintain a 1983 action in federal court if a state immunity statute shielded police from liability for negligent acts occurring in the course of duty. Yet, if the enactment of an immunity statute by a state is deemed to result in a federal remedy by default, not only would the state's law *ab initio* interest in fashioning rules of tort law be curtailed, but also state law would then determine the content of 1983 actions in federal court. This reasoning "would make the Fourteenth Amendment a font of tort law to be superimposed upon whatever systems may already be administered by the States." *Paul v. Davis*, 424 U.S. 693, 701, 96 S.Ct. 1155, 1160, 47 L.Ed.2d 405 (1976). I suggest that to allow a federal constitutional remedy in the circumstances presented here is not only contrary to the purposes of section 1983 but necessarily trivializes 1983 actions.

5. *Thibodeaux v. Bordelon*, 740 F.2d 329 (5th Cir.1984) is not to the contrary. Admittedly, *Thibodeaux* does not adopt the majority's distinction between "liberty interests" and "proper-

Daniels v. Williams, 720 F.2d 792 (4th Cir.1983). In this case, therefore, it is evident to me that whether the majority's analysis is followed—an analysis and result which I believe to be wholly correct—or an appropriate due process analysis is developed—the conclusions we reach must necessarily be the same. Judgment must be entered for the defendants.

SETTLE, Circuit Judge, dissenting:

I part company with the majority because I read the Supreme Court's decision in *Parratt v. Taylor*, 451 U.S. 527, 101 S.Ct. 1908, 68 L.Ed.2d 420 (1981), to dictate a different result. In *Parratt*, the Court considered whether "mere negligence will support a claim for relief under § 1983 ...." *Id.* at 532, 101 S.Ct. at 1911. The polestar of its analysis was "the complex interplay of the Constitution, statutes and facts" of the particular case. The Court eschewed "a single, general principle, however just that principle may be in the abstract ...." *Id.* at 531–32, 101 S.Ct. at 1911. Thus, the question presented here is not the abstract one of whether, as a general principle, negligence may support a § 1983 claim. Rather, the issue is whether plaintiff, under the facts of this case, has satisfied the specific requirements of § 1983.

Looking to the language of the Fourteenth Amendment and § 1983, the *Parratt* Court identified four elements which are necessary to any § 1983 claim purporting to be founded on a violation of the Due Process Clause of the Fourteenth Amendment.[1] First, the conduct complained of must have been committed by a person acting under color of state law. Second, an interest in life, liberty, or property must be implicated. Third, the conduct complained of must amount to a deprivation. And fourth, the state must have failed to provide due process of law. *Id.* at 535–37, 101 S.Ct. at 1913–14. The Court then applied this legal standard to the facts in *Parratt*.

The case before us is determined by the application of this four-part analysis. First, the defendants' actions in this case were clearly under color of state law. *See Monroe v. Pape*, 365 U.S. 167, 172–85, 81 S.Ct. 473, 476–82, 5 L.Ed.2d 492 (1961). Defendants do not argue otherwise.

Second, as the majority holds, plaintiff's claim falls within the scope of his Fourteenth Amendment liberty interest in personal security. *See Youngberg v. Romeo*, 457 U.S. 307, 102 S.Ct. 2452, 73 L.Ed.2d 28 (1982). A prison inmate retains his liberty interest except to the extent that it is "fundamentally inconsistent with imprisonment itself or incompatible with the objectives of incarceration." *Hudson v. Palmer*, — U.S. —, —, 104 S.Ct. 3194, 3198, 82 L.Ed.2d 393 (1984). Plaintiff's interest in being free from assault was surely not inconsistent with his status as a prisoner or with any legitimate penological objective.

Third, the conduct complained of constitutes a deprivation. The Supreme Court held that the negligently caused loss of property in *Parratt* "[u]nquestionably ... amounted to a deprivation." 451 U.S. at 536–37, 101 S.Ct. at 1913 (footnote omitted); *see Holman v. Hilton*, 712 F.2d 854, 856 (3d Cir.1983) ("section 1983 affords a remedy for negligent deprivations"). I can think of no persuasive reason why a negligently caused loss of a liberty interest is any less of a deprivation.

ty interests." However, in its procedural due process analysis, *Thibodeaux* affirmed the dismissal of the plaintiff's negligence action remitting him to his state law remedies. *Thibodeaux* does not address or discuss what result would obtain if no remedy were available in the Louisiana state courts. Nothing in *Thibodeaux* indicates that in such a situation the Fifth Circuit would then hold that the plaintiff had stated a federal cause of action under 1983. To the contrary, throughout its opinion, *Thibodeaux* cites the Fourth Circuit case of *Daniels v. Wil-*

liams, 720 F.2d 792 (4th Cir.1983) with approval. It should be remembered that *Daniels* did not remit the plaintiff to a federal cause of action when his state claim was barred by the doctrine of sovereign immunity.

1. This case does not call upon us to consider § 1983 claims founded on alleged violations of constitutional provisions other than the Due Process Clause.

Fourth, and finally, did the State of New Jersey provide due process of law? The state could not, of course, provide any pre-deprivation procedure. It has seen fit, however, to deny any postdeprivation remedy against defendants as well. Thus, we are not called upon to determine what would constitute adequate procedures in these circumstances. Furthermore, we need not consider the separate issue of what conduct might constitute a violation of substantive due process "even if undertaken with a full panoply of procedural protection" because it is "antithetical to fundamental notions of due process." *Parratt v. Taylor*, 451 U.S. at 545, 101 S.Ct. at 1918 (Blackmun, J., concurring). Since some procedural process is due when a person, acting under color of state law, deprives an individual of a liberty interest, the Due Process Clause of the Fourteenth Amendment has been violated in this case.[3] Therefore, plaintiff's claim is cognizable under § 1983.

This conclusion does not implicate a significant increase in § 1983 actions founded on alleged violations of the Due Process Clause because, as a general matter, states do not bar postdeprivation actions against their employees. States remain free, under *Parratt*, to provide an adequate postdeprivation remedy for their employees' negligent deprivations of property and negate the possibility of a § 1983 claim based on the denial of procedural due process. The reasoning in *Parratt* suggests that the same is true in the liberty context. 451 U.S. at 537–44, 101 S.Ct. at 1913–17; *see Thibodeaux v. Bordelon*, 740 F.2d 329, 334–37 (5th Cir.1984) ("no reason to differentiate between liberty interests and property interests" in the context of procedural due process) (Wisdom, J.). And, of course, that plaintiff "might not be able to recover under these remedies the full amount which he might receive in a § 1983 action is not ... determinative of the adequacy of the state remedies." *Hudson v. Palmer*, — U.S. at —, 104 S.Ct. at 3204; *Parratt v. Taylor*, 451 U.S. at 543–44, 101 S.Ct. at 1916–17.

My analysis implicitly rejects the contention that a prisoner cannot succeed under § 1983 for a deprivation of his Due Process liberty interest in circumstances where the Eighth Amendment "deliberate indifference" standard would not be satisfied. *Parratt* mandates that this contention be rejected unless, under the Due Process Clause, prisoners' liberty interests are to be given less protection than their property interests. Furthermore, consistency does not require that the standards under the two provisions be the same. On the one hand, there is a constitutional violation whenever the Eighth Amendment "deliberate indifference" standard is satisfied, since the violation is the deliberate indifference itself. On the other hand, a negligent deprivation of a liberty interest amounts to a violation of procedural due process only where the state fails to provide adequate postdeprivation procedures, since for Due Process Clause purposes "the State's action is not complete until and unless it provides or refuses to provide a postdeprivation remedy." *Hudson v. Palmer*, — U.S. at —, 104 S.Ct. at 3204. In sum, the causes of action under the Eighth and Fourteenth Amendments are birds of entirely different feathers.

3. In this case, the mere right to file an action is unnecessary to an process at all times, under New Jersey's immunity statute, the action must be terminated prior to any proceedings on the merits. It is true that due process does not always require proceedings on the merits. For instance, "the state certainly accords due process when it terminates a claim for 'failure to comply with a reasonable procedural or evidentiary rule.'" *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 437, 102 S.Ct. 1148, 1158, 71 L.Ed.2d 265 (1982). But this state immunity statute denies any "opportunity for [a] hearing appropriate to the nature of the case." *Id.* at 428, 102 S.Ct. at 1153 (quoting *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313, 70 S.Ct. 652, 656, 94 L.Ed. 865 (1950)). Only a federally-recognized immunity justifies this result, otherwise "a state immunity defense ... would transmute a basic guarantee into an illusory promise ..." *Martinez v. California*, 444 U.S. 277, 284 n. 8, 100 S.Ct. 553, 558 n. 8, 62 L.Ed.2d 481 (1963) (quoting *Hampton v. Chicago*, 484 F.2d 602, 607 (7th Cir.1973), *cert. denied* 415 U.S. 917, 94 S.Ct. 1413, 39 L.Ed.2d 471 (1974)).

I disagree with the majority's holding essentially because it finds no deprivation in this case. It does so without quoting the essential language in *Parratt*, which holds that plaintiff's loss in that case "even though negligently caused, amounted to a deprivation." 451 U.S. at 536-37, 101 S.Ct. at 1913 (footnote omitted).

Justice Powell, concurring in the result in *Parratt*, "would not" have held, under the facts of that case, that "a negligent act ... works a deprivation in the constitutional sense." *Id.* at 548, 101 S.Ct. at 1918. That he refused to join the majority opinion supports my reading of *Parratt*. Although there is much to be said for Justice Powell's opinion, which "would avoid trivializing the right of action provided in § 1983," we are not free to weigh the persuasiveness of his approach against that of the Court's and choose for ourselves which to apply.

Our court feels constrained to hold in this case that mere negligence does not constitute a deprivation, apparently because it equates two wholly different questions. The majority first notes that *Parratt* did not purport to announce a turnaround from the Supreme Court's prior position that traditional torts do not become constitutional violations simply because they are committed by state officials. On this basis it then concludes that the *Parratt* Court could not have held that mere negligence amounts to a deprivation. Although it is, of course, true that the Supreme Court did not hold that mere negligence by a state official amounts to a constitutional tort cognizable under § 1983, it did hold that such negligence amounts to a deprivation. Therefore, if the other elements of a § 1983 claim purporting to be founded on a violation of the Due Process Clause of the Fourteenth Amendment are made out; i.e., conduct under color of state law, a life, liberty or property interest, and a lack of adequate due process; then the § 1983 claim is cognizable.

The majority focused on the abstract general question, eschewed by the Supreme Court, of whether mere negligence amounts to a constitutional violation cognizable under § 1983. Consequently, it failed to answer properly whether plaintiff has satisfied the specific requirements of the statute, particularly the "deprivation" requirement, as they were analyzed by the Supreme Court in *Parratt*. Plaintiff, in my view, has satisfied those requirements.

I would affirm.

GIBBONS, Circuit Judge, dissenting:

The question presented in this appeal is a narrow one: may a state, when it involuntarily commits persons to the custody of state agents, thereby depriving those persons of the capacity for flight, self defense, or calls for assistance, consistent with the fourteenth amendment relieve those agents of the duty to take reasonable care to prevent third parties from injuring them. No broader issue is presented, for we are not here dealing with the duty of care owed to persons at liberty. No narrower question is presented either, for regardless of the reasons for commitment—civil or criminal, pre-trial or post-trial—every involuntarily committed person is identically deprived of the ability to resort to self help against the acts of third parties.

There was a time in our history when the government of the United States was so indifferent to the plight of persons involuntarily committed to custody by the states that it condoned hundreds of lynchings per year.[1] Among civilized persons in this twelfth decade of the fourteenth amendment, however, I would have hoped that a negative answer to the question presented would no longer be a matter of serious debate. Whatever a state may do in relieving its agents of the obligation to take

5. *United States v. Harris*, 106 U.S. 629, 1 S.Ct. 601, 27 L.Ed. 290 (1882) (Federal antilynching law unconstitutional); J. Chadbourn, *Lynching and the Law* (1933); W. White, *Rope & Faggot* (1929); National Association for the Advancement of Colored People, *Thirty Years of Lynching in the United States 1889-1918* (1919); J. Cutler, *Lynch-Law: An Investigation of the History of Lynching in the United States* (1905).

reasonable care in performing other duties, no body politic calling itself humane should assert that the custodians of the involuntarily committed may be relieved of the duty to take reasonable care to prevent harm from befalling their charges.[3] Yet six judges of this court unfortunately are of the view that custodians may be relieved of that duty. Because I share a common humanity with the involuntarily committed, I dissent.

I.

The Injury

Robert Davidson, a former inmate of the New Jersey State Prison at Leesburg, suffered serious personal injuries when he was beaten and stabbed by another inmate. In a suit brought in the district court pursuant to 42 U.S.C. § 1983 (1982) he contended that the beating and stabbing occurred because two state prison officers, Joseph Cannon and Robert James, failed to take reasonable care to prevent the incident. The trial court found that Cannon and James did fail to take reasonable care to prevent the incident, and awarded $1,000 in compensatory damages. This court holds unanimously that the district court's findings of fact are not clearly erroneous. Fed.R.Civ.P. 52(a). Therefore, for purposes of this appeal we agree that the state agents to whom the state entrusted custody of Davidson failed to take reasonable care to prevent a third party from inflicting harm on him.

II.

The New Jersey Scheme for Relieving its Agents of Responsibility

An appreciation of the New Jersey scheme for relieving its agents of responsibility requires an examination of developments in another state. In *Muskopf v. Corning Hospital District*, 55 Cal.2d 211, 359 P.2d 457, 11 Cal.Rptr. 89 (1961) Justice Traynor, in a typically enlightened opinion, held that the doctrine of governmental immunity in tort had outlived its usefulness. While at that time governmental entities in California and elsewhere claimed sovereign immunity from respondeat superior liability for the acts of their agents and servants, those agents and servants were, like the rest of us, subject to common law remedies except to the extent that judicial, legislative or executive officer immunity doctrines held otherwise. In reaction to Justice Traynor's opinion the California legislature passed a two-year moratorium on the application of the *Muskopf* holding while the State Law Review Commission studied the matter further.[4]

Justice Traynor would simply have made governmental agencies liable on a traditional respondeat superior basis, leaving in place the centuries old common law individual liability in tort of state agents. The Commission proposed a radically different approach. Accepting the proposition that the state could be liable in tort on a respondeat superior basis, it proposed, for the first time, to enlarge the areas in which state agents would enjoy personal immunity, and to make the state's immunity coextensive.[5] The result of the Commission's efforts was the California Tort Claims Act of 1963.[6]

Several years later when the New Jersey legislature, observing the New Jersey Supreme Court's discomfort with sovereign immunity in cases such as *B.W. King, Inc. v. West New York*, 49 N.J. 318, 325, 230 A.2d 132, 137 (1967), considered the prob-

3. *But see Union County Jail Inmates v. DiBuono*, 713 F.2d 984, 718 F.2d 1247 (3d Cir.1983) (pretrial detainees and sentenced inmates may be confined in conditions comparing unfavorably with those permitted by federal laws regulating the confinement of animals).

4. 1961 Cal.Stats., c. 1404, p. 3259, *codified at* Cal.Civ.Code § 22.3, Cal.Gov't Code § 961 (West 1982) (repealed 1970).

5. *Cf. Owen v. City of Independence*, 445 U.S. 622, 100 S.Ct. 1398, 63 L.Ed.2d 673 (1980) (Governmental entity does not enjoy immunities of its agents).

6. Cal.Gov't Code § 810 *et seq.* (West 1982 & Supp.1984).

law of governmental liability, it adopted the California approach, which recognized that governmental entities were subject to respondeat superior liability, but conferred on state agents in many instances an immunity from common law actions which they had never before in history enjoyed.[4] The purpose of the legislature to restrict common law liability of state agents is clear, for it declared "that while a private entrepreneur may readily be held liable for negligence within the chosen ambit of his activity, the area within which government has the power to act for the public good is almost without limit and therefore government should not have the duty to do everything that might be done." N.J.Stat.Ann. § 59:1-2 (West 1982). The declaration of purpose refers not to government liability as was the case under common law sovereign immunity, but rather to government duty. That change in focus from the absence of state liability to the absence of state duty is the central feature of the Act. It provides that "[a] public entity is not liable for an injury resulting from an act or omission of a public employee where the public employee is not liable." *Id.* § 59:2-2(b). Like its California counterpart, the New Jersey Act then provides a series of absolute statutory immunities which eliminate common law remedies historically available against such employees.[5]

The Tort Claims Act provides that the Attorney General must defend any action brought against a present or former state employee. *Id.* § 59:10A-1. It provides, moreover, that the State shall provide indemnification to present and former employees except for punitive or exemplary damages. *Id.* § 59:10-1. Thus under the Tort Claims Act the state's indemnification and defense undertaking, and the broad provisions for official immunity, are directly related. The state has undertaken to provide defense of claim and liability insurance for its employees, as a self-insurer, a public expense. Simultaneously, however, the state has attempted to protect its fisc by conferring on its employees and retaining for itself absolute immunity from recovery for certain injuries. And, as is apparent from the Attorney General's appearance in this appeal, New Jersey construes its statutory defense and indemnification obligations as extending to the defense of actions brought pursuant to 42 U.S.C. § 1983. The state is the real party in interest.

The atmosphere in which the New Jersey Tort Claims Act was considered by the legislature was hardly conducive to dispassionate reflection upon the appropriate balance between the needs of society and the accountability of state agents. At the time the Act was passed, lawsuits still were pending against New Jersey officials growing out of what the plaintiffs in those lawsuits contended were either excessive or inadequate reactions to the civil disturbances in 1967. In that atmosphere, perhaps not surprisingly, the legislature conferred several rather radical immunities on law enforcement officials and on custodians of involuntarily committed persons.

A number of New Jersey's immunity provisions bear upon the duty owed by custodians toward persons whom the state has placed in their charge. Perhaps the broadest is the provision that "[a] public entity is not liable for any injury caused ... by failing to enforce any law." N.J.Stat.Ann. § 59:2-4 (West 1982). Moreover "[n]either a public entity nor a public employee is liable for failure to provide police protection service or, if police protection service

4. The New Jersey courts have repeatedly acknowledged the California precedence of the New Jersey Tort Claims Act. *See, e.g., Birchwood Lakes Colony Club, Inc. v. Borough of Medford Lakes*, 90 N.J. 582, 449 A.2d 472 (1982); *Rivera v. Gerner*, 89 N.J. 526, 446 A.2d 508 (1982); *Brown v. Brown*, 86 N.J. 565, 432 A.2d 493 (1981); *Costa v. Josey*, 83 N.J. 49, 415 A.2d 337 (1980); *Kolitch v. Lindedahl*, 103 N.J.Super. 348, 473 A.2d 84 (App.Div.1984); *Ogrodnik v. Howard Housing Authority*, 193 N.J.Super. 413, 474 A.2d 1085 (App.Div.1984).

5. The Act makes a distinction between retrospective remedies at law and prospective remedies in equity. N.J.Stat.Ann. § 59:1-4 (West 1982). Obviously a prospective remedy would be of no use to Davidson. *See Ex Parte Young*, 209 U.S. 123, 28 S.Ct. 441, 52 L.Ed. 714 (1908).

is provided, for failure to provide sufficient police protection service." Id. § 59:5-4. Thus New Jersey public employees appear to be totally relieved of the duty to prevent even a lynching, for example. The Act also provides, that "[n]either a public entity nor a public employee is liable for failure to provide a medical facility or mental institution, or if such facility or institution is provided, for failure to provide sufficient equipment, personnel or facilities in a mental institution or medical facility." [6] Id. § 59:2-2. When a person has been confined for mental illness (which by definition includes mental deficiency) "[n]either a public entity nor a public employee is liable for ... (b) an injury caused by any person who has been confined ... upon any other person so confined." Id. § 59:6-7. Finally, "[n]either a public entity nor a public employee is liable for ... (b) any injury caused by: ... (4) a prisoner to any other prisoner." Id. § 59:5-2(b)(4). Thus the New Jersey Act treats civilly committed mental patients, and both pretrial detainees and convicted prisoners, in the same manner. It has conferred on the custodians a total immunity from any claim that they failed to exercise any level of care to prevent harm from fellow inmates. Moreover by eliminating liability for failure to provide police protection, New Jersey has relieved non-custodians, as well, of any obligation to prevent such harm.[7]

Under the New Jersey immunity scheme the state agent's state of mind is irrelevant. Immunity attaches whether the intentional agent acted or failed to act intentionally, or in reckless disregard of the consequences, or without reasonable care. Thus, under New Jersey law, Davidson could not recover from Cannon or James, or from the state, for the injuries he received at the hands of his fellow inmate under any conceivable set of circumstances. And in this respect the outcome would be the same under New Jersey law had Davidson been a patient in a New Jersey mental institution.

III.

The Federal Liberty Interest

Recognizing that it is beyond the power of the legislature, in California or New Jersey, to relieve state agents acting under color of those states' laws, of duties imposed by the constitution, the Attorney General of New Jersey urges that Davidson has no interest protected by the constitution or laws of the United States. Any right that he had to personal security from harm by fellow prisoners ended, according to the state, when Davidson was involuntarily committed to the custody of those state agents upon whom New Jersey conferred immunity.

For a brief period in 1978 the Supreme Court appeared to be flirting with the dangerous notion that the liberty clause of the fourteenth amendment had no federal substantive content, except perhaps, such as was set forth explicitly in other provisions of the constitution. One example of that

6. Cf. Youngberg v. Romeo, 457 U.S. 307, 102 S.Ct. 2452, 73 L.Ed.2d 28 (1982); Romeo v. Klein, 720 F.2d 266 (3d Cir.1983).

7. Other immunity provisions in the Tort Claims Act, not significant for the duty of care owed to persons involuntarily confined, relate to 42 U.S.C. § 1983 in other respects. These include N.J.Stat.Ann. §§ 59:3-1 and 59:3-6 (West 1982) (no liability for an injury caused by issuance, denial, suspension or revocation of, or refusal to issue, deny, suspend or revoke, any permit, license, certificate, approval, order, or similar authorization); id. §§ 59:3-8 and 59:3-13 (no liability for injuries caused by the termination or reduction of benefits under a public assistance program); id. § 59:3-2 (no liability for an injury resulting from exercise of judgment or discretion); id. § 59:3-3 (no liability for good faith action to construe or enforcement of any law); id. § 59:3-4 (no liability for injury caused by action under apparent authority of a law that is unconstitutional, invalid or inapplicable); id. § 59:3-5 (no liability for any injury caused by failure to enforce any law); id. § 59:3-6 (no liability for injury caused by execution or prosecution of any judicial or administrative proceeding); id. § 59:3-9 (no liability for entry upon any property); id. § 59:3-10 (no liability for misrepresentations made in scope of employment); id. § 59:5-1 (no liability for failure to provide facilities in a prison or other correctional facility); id. § 59:5-4 (no liability for failure to provide police protection).

dangerous flirtation in *Paul* v. *Davis*, 424 U.S. 693, 710, 96 S.Ct. 1155, 1164, 47 L.Ed.2d 405 (1976), effectively overruling the Court's holding in *Wisconsin* v. *Constantineau*, 400 U.S. 433, 91 S.Ct. 507, 27 L.Ed.2d 515-(1971) that there is a federal substantive liberty interest in one's reputation. According to *Paul* v. *Davis*, the due process clause protects the personal liberty to maintain a good repute only if a state positive law creates such an interest in the first place. Other examples of the Court's tendency toward sapping the liberty clause of federal substantive content were *Meachum* v. *Fano*, 427 U.S. 215, 228, 96 S.Ct. 2532, 2540, 49 L.Ed.2d 451 (1976) and *Montanye* v. *Haymes*, 427 U.S. 236, 243, 96 S.Ct. 2543, 2547, 49 L.Ed.2d 466 (1976), holding that a state prisoner had only such right to be free from transfer to more onerous conditions of confinement as could be found in state positive law. The tendency in these cases was to equate for purposes of analysis, the separate terms "life, liberty, or property" in the fourteenth amendment. Indeed the Court majority in those rather ominous opinions made essentially the same analysis with respect to due process protection of claimed personal liberty interests as in modern times it customarily makes with respect to due process protections of property. *See, e.g., Bishop* v. *Wood*, 426 U.S. 341, 96 S.Ct. 2074, 48 L.Ed.2d 684 (1976) (state law contract right required before employment is protected by due process clause); *Goss* v. *Lopez*, 419 U.S. 565, 95 S.Ct. 729, 42 L.Ed.2d 725 (1975) (state statutory right to attend school cannot be terminated without due process); *Board of Regents* v. *Roth*, 408 U.S. 564, 92 S.Ct. 2701, 33 L.Ed.2d 548 (1972) (state law contract right required before employment is protected by due process clause); *Goldberg* v. *Kelly*, 397 U.S. 254, 90 S.Ct. 1011, 25 L.Ed.2d 287 (1970) (welfare statutory entitlement cannot be terminated without due process). *Cf., e.g., Lochner* v. *New York*, 198 U.S. 45, 25 S.Ct. 539, 49 [illegible] 937 (1905) (state law cannot intrude upon federally protected right to contract). The Court's recognition that property rights are always creatures of some sovereign's positive law, and the fact that the term "property" in the fourteenth amendment must always have some positive law content—usually state law—was entirely sound. But it was one thing to hold that a property interest did not exist aside from some state positive law which created it, and quite another to hold that the right to life or to liberty was equally dependent on state positive law. The mode of analysis would enable the state legislatures to deprive the life and liberty clauses of the fourteenth amendment of any real meaning. Justice Stevens saw in the Court's mode of analysis the danger that positivism would degenerate into totalitarianism, and sounded the alarm in his dissent in *Meachum* v. *Fano*:

> If man were a creature of the State the analysis would be correct. But under the Bill of Rights and the laws of sovereign States create the liberty which the Due Process Clause protects. The relevant constitutional provisions are limitations on the power of the sovereign to infringe on the liberty of the citizen. The relevant state laws either create property rights, or they curtail the freedom of the citizen who must live in an ordered society. Of course, law is essential to the exercise and enjoyment of individual liberty in a complex society. But it is not the source of liberty, and surely not the exclusive source.
>
> I had thought it self-evident that all men were endowed by their Creator with liberty as one of the cardinal unalienable rights. It is that basic freedom which the Due Process Clause protects, rather than the particular rights or privileges conferred by specific laws or regulations.

427 U.S. at 230, 96 S.Ct. at 2541 (Stevens, J., dissenting).

Whether because of Justice Stevens' warning against statism or for other reasons, the Court in 1977 reconsidered its drift in that direction. In *Ingraham* v. *Wright*, 430 U.S. 651, 673, 97 S.Ct. 1401, 1413, 51 L.Ed.2d 711 (1977) it held that "[a]mong the historic liberties ... protected [by the due process clause] was a right

to be free from, and to obtain judicial relief for, unjustified intrusions on personal security." The holding in *Ingraham v. Wright* was a reiteration of the position taken by the Court prior to its 1974 flirtation with caution in matters of personal liberty. Indeed the court in *Ingraham v. Wright* relied on its holding in *Rochin v. California*, 342 U.S. 165, 72 S.Ct. 205, 96 L.Ed. 183 (1952) that the state violated a defendant's right to personal security by subjecting him, involuntarily, to a stomach pump. 430 U.S. at 673-74, 97 S.Ct. at 1413-14. The holding in *Ingraham v. Wright* confirmed the soundness of this court's opinion in *Curtis v. Everette*, 489 F.2d 516, 518 (3d Cir.1973) *cert. denied*, 416 U.S. 995, 94 S.Ct. 2408, 40 L.Ed.2d 774 (1974) that the fourteenth amendment was violated when prison guards permitted an assault on the plaintiff by a fellow prisoner, for our opinion also relied on *Rochin v. California*.

A year after *Ingraham v. Wright* the Court in *Addington v. Texas*, 441 U.S. 418, 99 S.Ct. 1804, 60 L.Ed.2d 323 (1979) reconfirmed that the fourteenth amendment, entirely aside from state positive law, recognized the personal liberty to be free from restraint, holding that despite the state's *parens patriae* powers in providing care for persons unable to care for themselves, the state could not involuntarily commit those persons on proof of their condition no more substantial than a preponderance of the evidence.[10]

The right of personal security at issue in *Ingraham v. Wright* was that of a student who was at liberty except for the mild coercion of the state's school attendance law. In *Addington v. Texas* the person alleged to be mentally ill was at liberty until the state attempted his involuntary confinement. Nevertheless the Court's reliance in *Ingraham v. Wright* on *Rochin v. California*, which involved a pretrial detainee, suggested that it would not distinguish, for purposes of the existence of the right to personal security, between persons at liberty and persons confined. This was confirmed a year after *Addington v. Texas* when in *Vitek v. Jones*, 445 U.S. 480, 490-91, 100 S.Ct. 1254, 1262-63, 63 L.Ed.2d 552 (1980) the Court held that even a convicted prisoner had a federally protected liberty interest, entirely apart from state positive law, in freedom from confinement in a mental institution.

Still more recently in *Youngberg v. Romeo*, 457 U.S. 307, 102 S.Ct. 2452, 73 L.Ed.2d 28 (1982) the Court not only reiterated that all involuntarily committed persons, entirely aside from state positive law, retained a federally protected interest in personal safety. *Id.* at 315-16, 102 S.Ct. at 2458. The quotation in Judge Sloviter's opinion from Justice Powell's opinion of the Court in *Youngberg v. Romeo* establishes unequivocally that the right to be confined only in safe conditions applies equally to all persons whom the state commits involuntarily, regardless of the purpose of the confinement.

All the judges participating in this appeal, albeit with varying degrees of enthusiasm, join in rejecting New Jersey's contention that Davidson had no constitutionally protected right to personal safety while he was confined.[11] Convicted prisoners, pretrial detainees, and the civilly committed all have that same right.[12]

IV.

The Absence of a State of Mind Requirement in Section 1983

Section 5 of the fourteenth amendment authorizes Congress to enforce its provi-

10. *Addington v. Texas* reconfirmed the authority of *O'Connor v. Donaldson*, 422 U.S. 563, 95 S.Ct. 2486, 45 L.Ed.2d 396 (1975); *Jackson v. Indiana*, 406 U.S. 715, 92 S.Ct. 1845, 32 L.Ed.2d 435 (1972); *Humphrey v. Cady*, 405 U.S. 504, 92 S.Ct. 1048, 31 L.Ed.2d 394 (1972); *In re Gault*, 387 U.S. 1, 87 S.Ct. 1428, 18 L.Ed.2d 527 (1967) and *Specht v. Patterson*, 386 U.S. 605, 87 S.Ct. 1209, 18 L.Ed.2d 326 (1967).

11. Judge Garth's separate opinion is too sophisticated for my comprehension but since he joins in Judge Sloviter's opinion I assume that he approves the holding in Part III thereof that Davidson has a constitutionally protected right to personal safety while confined.

12. In this respect New Jersey is consistent. It denies any duty to protect the safety of any of them.

state by appropriate legislation. Congress might have left the enforcement of the amendment primarily to the Supreme Court exercising supervision over the courts of the states. Instead, even before its effective date, Congress passed for the first time a statute of general application implementing the first clause in article III section 2 of the Constitution, empowering the lower federal courts to exercise jurisdiction in cases arising under the Constitution and laws of the United States.[13] When, following ratification of the amendment, Congress reenacted parts of the earlier statute, it used the broadest conceivable language, providing that "any person who ... shall subject, or cause to be subjected, any person ... to the deprivation of any rights, privileges, or immunities secured by the Constitution of the United States, shall, any such law, statute, ordinance, regulation, custom, or usage of the State to the contrary notwithstanding, be liable to the party injured in any action at law, suit in equity, or other proper proceeding for redress ..."[14] This statute, codified at 42 U.S.C. § 1983, still contains the sweeping language of the 1871 Congress.

When the 1871 Congress acted, the federal courts had little prior experience with federal question jurisdiction. The only previous jurisdictional statute of any moment in that respect was that chartering the Second Bank of the United States, which had afforded the Marshall Court its sole opportunity to construe the first clause in article III section 2. In *Osborn v. United States Bank*, 22 U.S. (9 Wheat.) 738, 6 L.Ed. 204 (1824) the Court held that Congress could confer on the lower federal courts federal question subject matter jurisdiction over any case in which was presented a question over which, had the case arisen in a state court, the Supreme Court would have potential appellate jurisdiction. It is reasonable to conclude that the sweeping language of the 1871 Civil Rights Act was intended to implement article III section 2, with respect to matters covered by the fourteenth amendment, to the full extent permitted under *Osborn*. Moreover, at the time of its enactment federal equity practice was eminently uniform. On the law side, however, the federal courts under the Process Act[15] borrowed the practice, as of the date of each state's admission to the Union, of the states in which they sat. Thus one may be reasonably certain that in 1871 when Congress used the language "any action at law" it was fully cognizant of the fact that government agents had always been subject to the full range of common law remedies many of which had no state of mind requirement, and that in the future, persons acting under color of state law would be subject to that same full range of common law remedies in the federal courts.

The Civil Rights Act of 1871 was, of course, overshadowed by the Court following the constitutional settlement of 1877.[16] So deep was the sleep that a leading expert on practice in the federal courts writing in 1885 did not even include that Act in listing of statutes providing exceptions to the jurisdictional amount requirement. *See*, Dobie, *Jurisdictional Amount in the United States District Court*, 26 Harv.L.Rev. 738, 738 (1913). The Act remained dormant until the late 1930's. When it reemerged, the initial cases which gave any significance to the Act involved intentional actions of a rather extreme sort.[17] Because the early cases after the statute was rediscovered involved conduct that was

13. Act of April 9, 1866, ch. 31, § 3, 14 Stat. 27.

14. Act of April 20, 1871, ch. 22, § 1, 17 Stat. 13.

15. Act of May 8, 1792, ch. 36, § 2, 1 Stat. 275, 276. *See, Wayman v. Southard*, 23 U.S. (10 Wheat.) 1, 6 L.Ed. 253 (1825) (changes in state procedural law inapplicable to actions at law in a federal court). 16. Act of June 1, 1872, ch. 255, 17 Stat. 196.

16. The soundness was subsequently principally in *Carter v. Greenhow*, 114 U.S. 317, 5 S.Ct. 928, 29 L.Ed. 202 (1884); *Hale v. Indiana Manufacturing Co.*, 170 U.S. 48, 20 S.Ct. 272, 44 L.Ed. 37 (1900) and *Barney v. City of New York*, 193 U.S. 430, 24 S.Ct. 502, 48 L.Ed. 737 (1904).

17. *Hague v. C.I.O.*, 307 U.S. 496, 59 S.Ct. 954, 83 L.Ed. 1423 (1939) is the leading example.

not only intentional, but also specifically endorsed by state law, it was not until some years after the Federal Rules of Civil Procedure had supplanted common law remedies in the federal courts that the Supreme Court addressed the question whether, for the first time, a state of mind requirement should be read into the sweeping language of section 1983. In *Monroe v. Pape*, 365 U.S. 167, 81 S.Ct. 473, 5 L.Ed.2d 492 (1961) the Court, for the first time after the post-reconstruction era, examined with any degree of consciousness the congressional intention reflected in the 1871 Act.[16] Even Justice Frankfurter, who never fully reconciled himself to the Warren Court's disassociation from the constitutional settlement of 1877, acknowledged that a specific intent requirement could not be read into section 1 of the Act, although the criminal counterpart originating in the same statute had been so construed. In *Monroe*, he wrote:

> If the courts are to enforce § 1[983], it is an unhappy form of judicial disapproval to surround it with doctrines which partially and unequally obstruct its operation. Specific intent in the context of the section would mean such embarrassment without countervailing justification. Petitioners' allegations that respondents in fact did the acts which constituted violations of constitutional rights are sufficient.

365 U.S. at 207-08, 81 S.Ct. at 488 (Frankfurter, J., dissenting in part). Justice Frankfurter's dissent focused, instead, on the absence of a constitutional violation here—on the actions of the defendants were illegal under state law.[17] On that issue Justice Frankfurter stood alone. The Court was unanimously of the view, however, that no specific intent requirement could legitimately be written into section 1983 by judicial exegetes of the legislative function. If section 1983 was to re-emerge from the closet in which it had been hidden by the post-reconstruction Court, it would reemerge as written. In the words of Justice Douglas, section 1983 "should be read against the background of tort liability that makes a man responsible for the natural consequences of his actions." 365 U.S. at 187, 81 S.Ct. at 484.

The decision in *Monroe v. Pape* was not greeted with universal enthusiasm, even among article III judges.[18] Despite *Monroe v. Pape*'s clarity on the state of mind issue, litigants frequently attempted to convince lower federal courts to judicially write a state of mind requirement into section 1983. One such attempt was made in this court when the defendants urged that the fact that a policeman defendant was motivated by personal animosity against the plaintiff sufficed to place his acts outside the scope of section 1983. That contention was rejected in *Bonnette v. Wier*, 340 F.2d 74 (4th Cir.1965) by Judge Boggs, who unlike many of his contemporaries and successors, was an enthusiastic protector of civil rights.[19] His opinion stated:

> While a specific intent to deprive a person of his constitutional rights is required under criminal sections of the Civ-

16. The examination was less thorough than it should have been. Compare *Monroe v. Pape*, 365 U.S. 167, 81 S.Ct. 473, 5 L.Ed.2d 492 (1961) with dissent in *Department of Social Services of the City of New York*, 436 U.S. 658, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978).

17. There are striking similarities between Judge Bonner's opinion and Justice Frankfurter's dissent in *Monroe v. Pape*. Judge Bonner does not go so far, however, as to suggest as Justice Frankfurter urged that *Barnes v. City of New York*, 193 U.S. 430, 24 S.Ct. 502, 48 L.Ed. 737 (1904) which had been cast in doubt by *Home Tel. & Tel. Co. v. Los Angeles*, 227 U.S. 278, 33 S.Ct. 312, 57 L.Ed. 510 (1913), and overruled in *Ground Steam v. Barnes*, 340 U.S. 17, 80 S.Ct. 519, 4 L.Ed.2d 524 (1960), should be reestablished. This Court is still unanimously of the view that the legality or illegality of a defendant's action under state law is not determinative for purposes of section 1983 or the fourteenth amendment, *vel non*.

18. See, e.g., Gilbert, *Judicial Expansion of Federal Jurisdiction: A Federal Judge's Thoughts on Section 1983, Comity and the Federal Courts*, 1973 Law and Social Order 157 (1973).

19. See, e.g., *Hickey v. Pennsylvania R. Co.*, 151 F.2d 240 (3d Cir.1945); *Wagner v. C.I.O.*, 170 F.2d 774 (3d Cir.), *aff'd in part and modified in part*, 337 U.S. 686, 69 S.Ct. 1334, 93 L.Ed. 1603 (1949).

§ Rights Acts, 28 U.S.C. §§ 241, 243, neither specific intent nor purpose to deprive an individual of his civil rights is a prerequisite to civil liability under the civil provisions of the Civil Rights Act. *Id.* at 91. That, of course, was precisely what the Supreme Court had held unanimously in *Monroe v. Pape*, a case on which Judge Biggs expressly relied. *Id. Monroe v. Pape* and *Basista v. Weir* required no more than proof of action under color of state authority, which is in this case conceded. Unlike Judge Stevens's exploratory effort to find, in the several opinions written in *Monroe v. Pape*, something which is not there, Judge Biggs' treatment of that case is consistent with the position taken by all the Justices on the critical issue in that case—namely that only the state could violate the Constitution. The language of Justice Harlan quoted by Judge Stevens, p. 628, relates to that issue—the identity of the actor—not to any state of mind requirements.

Because not all lower court federal judges shared Judge Biggs' admirable enthusiasm for holding accountable all persons acting under color of state authority, it was not surprising that efforts to have the Court read a state of mind requirement into section 1983 would persist. Those efforts, as Judge Stevens acknowledges, produced "no discernible thread." P. 623. Resistance to accountability by state officials in federal courts for their actions taken under color of state law did not slacken as the personnel of the Supreme Court changed during the 1970's, and several times it appeared that the *Monroe v. Pape* interpretation of section 1983 might be reconsidered. As Judge Stevens acknowledges, the Court in *Procunier v. Navarette*, 434 U.S. 555, 559 n. 6, 98 S.Ct. 855, 858 n. 6, 55 L.Ed.2d 24 (1978) granted certiorari to consider whether a state of mind requirement should be read into that section, but the case was decided on an unrelated ground.

When the Fifth Circuit Court of Appeals held in *McCollan v. Tate*, 573 F.2d 908 (5th Cir.1978) that a plaintiff should have a claim presented to the jury that the defendant sheriff had failed to take reasonable care to prevent his deputies from violating plaintiff's constitutional rights, the Court once again considered the section 1983 state of mind question. Justice Rehnquist wrote for the Court:

> Having been around this track once before in *Procunier*, *supra*, we have come to the conclusion that the question whether an allegation of simple negligence is sufficient to state a cause of action under § 1983 is more elusive than it appears at first blush. It may well not be susceptible of a uniform answer across the entire spectrum of conceivable constitutional violations which might be the subject of a § 1983 action. In any event, before the relationship between the defendant's state of mind and his liability under § 1983 can be meaningfully explored, it is necessary to isolate the precise constitutional violation with which he is charged.

Baker v. McCollan, 443 U.S. 137, 139–40, 99 S.Ct. 2689, 2692, 61 L.Ed.2d 433 (1979). The deprivation alleged in *Baker v. McCollan* was the detention, pursuant to a valid arrest warrant, of the wrong party. The Court held that the plaintiff had shown no invasion of any federally protected right and thus once again declined to overrule the unanimous holding in *Monroe v. Pape* that section 1983 includes no state of mind requirement. Justice Rehnquist's admonition, however, that the answer to the question whether "failure to exercise reasonable care to avoid or prevent constitutional violations 'may not be susceptible of a uniform answer across the entire spectrum of constitutional violations' shows his awareness of the need to focus upon the nature of the interest being invaded—either liberty or property—and upon the extent to which actions by the state may have made it impossible for the victim to have avoided the invasion by action of his own.

It should be noted that in *Baker v. McCollan* the Court decided a constitutional law issue, holding that the fourth amendment was not violated by an inadvertent arrest and detention of the wrong defen-

ant pursuant to a valid warrant. A construction of section 1983 which would have read into it a state of mind requirement higher than the departure from reasonable care would have permitted the Court to avoid the decisions of that constitutional law question. *See Hagans v. Lavine*, 415 U.S. 528, 527–43, 94 S.Ct. 1372, 1379–82, 39 L.Ed.2d 577 (1974). The Court could have held that assuming, arguendo, a fourth amendment violation had occurred as a result of the failure to take reasonable care to avoid it, Congress intended that its post-occurrence vindication could only take place in a state court, with review in the Supreme Court under 28 U.S.C. § 1257. Thus in reaching the constitutional issue the *Baker v. McCollan* Court then made a conscious albeit implicit decision that it would not reconsider the *Monroe v. Pape* interpretation of section 1983.

Judge Sloviter states that Justice Rehnquist's distinction between the state of mind required by section 1983 and the state of mind required by the constitution is "enigmatic." P. 822, n. 3. There is no enigma. Justice Rehnquist was well aware, just as the members of this court are well aware, that some violations of the Constitution plainly do require a state of mind—infliction of punishment in violation of the eighth amendment, for example. Others plainly do not—violations of the establishment clause of the first amendment, for example. Thus the description of *Baker v. McCollan* as "enigmatic" is no more than an unwarranted effort to disregard the Supreme Court's unadorned refusal in that case to overrule the interpretation of section 1983 which in *Monroe v. Pape* it had unanimously adopted.

Shortly after *Baker v. McCollan* was decided the Supreme Court in *Martinez v. California*, 444 U.S. 277, 100 S.Ct. 553, 62 L.Ed.2d 481 (1980) considered for the first time a provision of the California Tort Claims Act, on which New Jersey's Act is modeled. The section in question, the equivalent of which is N.J.Stat.Ann. § 59:5-2 (West 1982), provided that "[n]either a public entity nor a public employee is liable for: (a) Any injury resulting from determining whether to parole or release a prisoner ...." Cal.Gov't Code Ann. § 845.8(a) (West 1982). Plaintiffs sought recovery in a California state court for the death of a fifteen year old who had been murdered by a sex offender released on parole five months earlier, allegedly as a result of the negligence of the parole officials. The plaintiffs asserted a claim under section 1983, which the California court rejected. On appeal, the Supreme Court affirmed. Justice Stevens wrote:

> Although the decision to release Thomas from prison was action by the State, the action of Thomas five months later cannot be fairly characterized as state action. Regardless of whether, as a matter of state tort law, the parole board could be said either to have had a "duty" to avoid harm to his victim or to have proximately caused her death, *see Grimm v. Arizona Bd. of Pardons and Paroles*, 115 Ariz. 260, 564 P.2d 1227 (1977); *Palsgraf v. Long Island R. Co.*, 248 N.Y. 339, 162 N.E. 99 (1928), we hold that taking these particular allegations as true, appellees did not "deprive" appellants' decedent of life within the meaning of the Fourteenth Amendment.
>
> Her life was taken by the parolee five months after his release. He was in no sense an agent of the parole board. Cf. *Scheuer v. Rhodes*, 416 U.S. 232 [94 S.Ct. 1683, 40 L.Ed.2d 90 (1974)]. Further, the parole board was not aware that appellants' decedent, as distinguished from the public at large, faced any special danger. We need not and do not decide that a parole officer could never be deemed to "deprive" someone of life by action taken in connection with the release of a prisoner on parole. But we do hold that at least under the particular circumstances of this parole decision, appellants' decedent's death is too remote a consequence of the parole officers' action to hold them responsible under the federal civil rights law. Although a § 1983 claim has been described as "a species of tort liability," *Imbler v. Pachtman*, 424 U.S. 409, 417 [96 S.Ct. 984, 988, 47

L.Ed.2d 128 (1976)], it is perfectly clear that not every injury in which a state official has played some part is actionable under that statute.

444 U.S. at 284-85, 100 S.Ct. at 559 (footnotes omitted).

The unanimous decision in *Martinez v. California* is significant for this case in two respects. First, it confirms that neither California nor New Jersey can confer an immunity which must be recognized in a section 1983 action, even in a state court. The Court recognizes explicitly that because there is concurrent jurisdiction over section 1983 actions, state courts must entertain them.[2] 444 U.S. at 283 n. 7, 100 S.Ct. at 558 n. 7, citing *Testa v. Katt*, 330 U.S. 386, 391, 67 S.Ct. 810, 813, 91 L.Ed. 967 (1947). Second, the opinion, in determining the liability of the parole officers for their own actions as distinct from the actions of the murderer, makes a conventional tort law proximate cause analysis. There is no suggestion in *Martinez v. California* that had proximate cause standards been satisfied, the state employees would have been excused from the duty to take reasonable care to prevent foreseeable harm. Indeed the clear implication of Justice Stevens' opinion is that had proximate cause been established between the parole board's negligence and the death of the victim section 1983 would provide a remedy.

The issue of a state of mind requirement in section 1983 was next addressed in *Parratt v. Taylor*, 451 U.S. 527, 101 S.Ct. 1908, 68 L.Ed.2d 420 (1981). Unlike the federally protected liberty interest in personal security involved in *Baker v. McCollan* and in this case, *Parratt* involved a state law property interest. The plaintiff, an inmate of the Nebraska Penal and Correctional Complex, proceeding *pro se* convinced the district court that state officers had negligently deprived him of property. The Court of Appeals for the Eighth Circuit affirmed without opinion. 620 F.2d 307 (1980). Nebraska petitioned for certiorari and the first question presented in its petition is "[w]hether simple negligence, if proven, may form the basis of a judgment under 42 U.S.C. § 1983." *Petition for cert. granted*, 449 U.S. 917, 101 S.Ct. 315, 66 L.Ed.2d 145, filed May 1, 1980 at 2. Nebraska's brief on the merits identifies the same issue as a question presented: "[w]hether simple negligence, if proven may form the basis of a judgment under 42 U.S.C. § 1983." Brief for Petitioner at *Parratt*. Point II of Nebraska's brief on the merits is captioned "The Issue of Negligence," *id.* at 14 and discussion of the issue occupies fifteen pages in a thirty page brief. The American Civil Liberties Union and a variety of *amici* were permitted to file extensive briefs as *amicus curiae* on the issue of whether section 1983 requires a particular state of mind. Since Nebraska sought certiorari in a case in which the respondent was a *pro se* litigant in which it had to appoint counsel, and in which the Court of Appeals wrote no opinion, it is clear beyond question that the Court deliberately selected *Parratt* for review in order to consider once again whether section 1983 should for the first time be held to embody a state of mind requirement. Justice Rehnquist confirmed that this was the case, observing that the Court had

> twice granted certiorari in cases to decide whether mere negligence will support a claim for relief under § 1983, see *Procunier v. Navarette*, 434 U.S. 555 [98 S.Ct. 855, 55 L.Ed.2d 24] (1978), and *Baker v. McCollan*, 443 U.S. 137 [99 S.Ct. 2689, 61 L.Ed.2d 433] (1979), [and] in each of those cases found it unnecessary to decide the issue.

451 U.S. at 532, 101 S.Ct. at 1911. The quoted statement that in *Baker v. McCollan* it was not necessary to decide the issue is hardly consistent with *Hagans v. Lavine*. Be that as it may, in *Parratt* the

[2] Thus despite any possible implications to the contrary in Judge Garth's opinion, the outcome of this case must be the same whether Davidson proceeded in a federal or a state forum. The state could eliminate causes of action based on state law, but must entertain section 1983 causes of action.

Court's holding is explicit. Reviewing the legislative history of section 1983 and its prior interpretation by the Court, Justice Rehnquist wrote:

> Nothing in the language of § 1983 or its legislative history limits the statute solely to intentional deprivations of constitutional rights. In *Baker v. McCollan* we suggested that simply because a wrong was negligently as opposed to intentionally committed did not foreclose the possibility that such action could be brought under § 1983 .... Section 1983, unlike its criminal counterpart, 18 U.S.C. § 242, has never been found by this Court to contain a state-of-mind requirement. This Court recognized as much in *Monroe v. Pape*, 365 U.S. 167 [81 S.Ct. 473, 5 L.Ed.2d 492] (1961) ....

451 U.S. at 534, 101 S.Ct. at 1912 (footnote omitted). Justice Rehnquist then approvingly quoted Justice Douglas' statement in *Monroe v. Pape* that section 1983 "should be read against the background of tort liability that makes a man responsible for the natural consequences of his actions." *Parratt*, 451 U.S. at 535, 101 S.Ct. at 1912-1913, *quoting* 365 U.S. at 187, 81 S.Ct. at 484. He then concluded:

> Both *Baker v. McCollan* and *Monroe v. Pape* suggest that § 1983 affords a "civil remedy" for deprivations of federally protected rights caused by persons acting under color of state law without any express requirement of a particular state of mind. Accordingly, in any § 1983 action the initial inquiry must focus on whether the two essential elements to a § 1983 action are present: (1) whether the conduct complained of was committed by a person acting under color of state law; and (2) whether this conduct deprived a person of rights, privileges, or immunities secured by the Constitution or laws of the United States.

Parratt, 451 U.S. at 535, 101 S.Ct. at 1913.

Thus unlike the judges who join in Judge Sloviter's opinion, Justice Rehnquist and the Justices joining in his *Parratt v. Taylor* opinion found nothing "enigmatic" in his *Baker v. McCollan* opinion. He read it, as I do, to be consistent with the unanimous interpretation of section 1983 in *Monroe v. Pape*. Moreover he read *Monroe v. Pape* in exactly the same way Judge Biggs read it for this court in *Bonsto v. Weir*, *supra*.

Only after deciding the issue of statutory interpretation tendered by Nebraska did the *Parratt* Court turn to the alternative constitutional ground of decision: that for the negligent destruction of personal property a post-event tort remedy satisfies due process. That course was consistent with the Court's settled practice. Had section 1983 been interpreted as requiring a particular state of mind, rather than conduct objectively unreasonable in light of the risk of harm, the Court could, and would, have reversed on statutory rather than constitutional grounds. *See, Hagans v. Lavine*, *supra*. Thus the Court's discussion of the statutory issue on which it granted certiorari is unquestionably and unequivocally a holding that a failure to take reasonable care to avoid an invasion of a constitutionally protected interest is actionable under section 1983. The Court continued:

> Unquestionably, respondent's claim satisfies three prerequisites of a valid due process claim: the petitioners acted under color of state law; the hobby kit falls within the definition of property; *and the alleged loss, even though negligently caused, amounted to a deprivation.*

451 U.S. at 536-37, 101 S.Ct. at 1913 (footnote omitted) (emphasis added). It was not a deprivation without due process of law, however, but only because Nebraska, unlike New Jersey, preserved the historical liabilities of state employees for their failure to take reasonable care of property which because of their positions came into their possession.

Before a case presenting a *Parratt v. Taylor* issue reached this court the Supreme Court in *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 102 S.Ct. 1148, 71 L.Ed.2d 265 (1982) afforded further guidance with respect to the relationship between state positive law and the due pro-

cess clause of the fourteenth amendment. *Logan* involved a state-created expectation that physically handicapped persons would not be discriminated against in private employment. In that case state officials in an administrative agency neglected to convene a hearing on the charge of discrimination within the time provided in the antidiscrimination statute, and the Illinois Supreme Court rejected Logan's contention that this neglect violated due process. The Supreme Court, distinguishing *Parratt v. Taylor*, held that the negligent failure to schedule a hearing deprived Logan of a state-created interest without due process. Justice Blackmun wrote:

> Despite appellee Zimmerman Brush Company's arguments, the recent decision in *Parratt v. Taylor*, 451 U.S. 527 [101 S.Ct. 1908, 68 L.Ed.2d 420] (1981) is not to the contrary. There, a state employee *negligently lost* a prisoner's hobby kit; while *the Court concluded that the prisoner had suffered a deprivation of property within the meaning of the Fourteenth Amendment*, it held that all the process due was provided by the State's tort claims procedure.

455 U.S. at 435, 102 S.Ct. at 1157 (emphasis supplied). Thus the opinion of the Court in *Logan* confirms what is plain in *Parratt*: a negligent deprivation of property by a state officer is a deprivation of property within the meaning of the fourteenth amendment.[33] The *Logan* Court's treatment of *Ingraham v. Wright* is also significant. Justice Blackmun wrote:

> In *Ingraham v. Wright*, 430 U.S. 651 [97 S.Ct. 1401, 51 L.Ed.2d 711] (1977), the Court concluded that state tort remedies provided adequate process for students subjected to corporal punishment in school. In doing so, however, the Court emphasized that the state scheme "*preserved what 'has always been the law of the land,'*" *id.*, at 679 [97 S.Ct. at 1416], quoting *United States v. Barnett*, 376 U.S. 681, 692 [84 S.Ct. 984, 990, 11 L.Ed.2d 22] (1964), and that adding additional safeguards would be unduly burdensome. 430 U.S., at 680-682 [97 S.Ct. at 1417-1418]. Here, neither of those rationales is available. Terminating potentially meritorious claims in a random manner is hardly a practice in line with our common-law traditions.

455 U.S. at 436 n. 10, 102 S.Ct. at 1158 n. 10 (emphasis supplied).

Justice Blackmun's reference to preservation of what has always been the law of the land is significant, because until the New Jersey legislature decreed otherwise it had always been the law of the land that custodians of incarcerated persons had a duty to take reasonable care to prevent third parties from inflicting harm on their charges. The law of the land in that respect is reflected in the rule announced in Restatement (Second) Torts, § 320 (1965):

> One who is required by law to take or who voluntarily takes the custody of another under circumstances such as to deprive the other of his normal power of self-protection or to subject him to association with persons likely to harm him is under a duty to exercise reasonable care so to control the conduct of third persons as to prevent them from intentionally harming the other or so conducting themselves as to create an unreasonable risk of harm to him, if the actor (a) knows or has reason to know that he has the ability to control the conduct of the third persons, and (b) knows or should know of the necessity and opportunity for exercising such control.

Id. Before New Jersey joined California in relieving public employees of their historically recognized duties under the law of the land, the rule announced in Restatement (Second) Torts, § 320 (1965) was the law of that state. *Harris v. State*, 61 N.J. 585, 297 A.2d 841 (1972).[34] The rule in *Logan*

33. *Judge Skelton* characterizes *Logan v. Zimmerman Brush Co.*, p. 830, but her selective quotation *unfairly* ignores those parts of Justice Blackmun's opinion in which he discusses issues relevant to this case.

34. The rule is not a recent innovation. Both the black-letter and Comments in Restatement (Second) Torts § 320 (1965) are taken verbatim from Restatement (First) Torts § 320 (1934). Comment (a) provides that "[t]he rule stated in

states plainly that the decision in *Ingraham v. Wright* would have been otherwise if Florida in that case had attempted to relieve school officials of the duty of care imposed by the common law.

After *Logan v. Zimmerman Brush Co.* was decided a case presenting operative facts similar to those in *Parratt v. Taylor* was filed in the District of New Jersey. Charles Holman, a prisoner serving a life sentence had attempted to replevy personal property, or to recover its value, in a New Jersey state court.[24] Without considering any section 1983 claim the state court, relying on N.J.Stat.Ann. 59:5-3 (West 1982) dismissed.[25] The prisoner then commenced a section 1983 action in the federal court, and moved for partial summary judgment challenging the constitutionality of section 59:5-3. Judge Debevoise, in a carefully reasoned opinion which relied on *Parratt* and *Logan*, granted a partial summary judgment, holding that as applied to Holman, section 59:5-3 was unconstitutional, in that it deprived Holman of important interests in property without due process.

The trial court certified the case for interlocutory review pursuant to 28 U.S.C. § 1292(b) (1982), and this court, after careful consideration of essentially the same contentions made by New Jersey in the instant appeal, affirmed. Judge Hunter, who today mysteriously joins in Judge Sloviter's opinion, wrote:

> Reading *Parratt* and *Logan* together, it is plain that while *Parratt* may relegate a prisoner to his state tort remedies when such remedies are available, *Logan* provides the framework for analyzing the constitutional adequacy of state procedural limitations on those remedies. Therefore the principles of *Logan* are applicable in cases where it is claimed that the State refuses to make available to a claimant the established state procedures otherwise available for redress of deprivations of property.

Holman v. Hilton, 712 F.2d 854, 858 (3d Cir.1983). Judge Hunter then proceeded to analyze the effect of N.J.Stat.Ann. 59:5-3 on *Holman*, concluding that while that section of the Tort Claims Act only postponed a lawsuit, tolling the statute of limitations in the meantime, its effect on a prisoner serving a life or long-term sentence was no different, practically, than had the remedy been totally eliminated. 712 F.2d at 859. Since this was so, Holman could bring a section 1983 action for the negligent loss of his property.

The opinions in *Holman v. Hilton* are honest treatments of the Supreme Court case law dealing with the question whether section 1983 includes a state of mind requirement, and they should control the outcome of this case. Judge Sloviter's treatment of the *Holman* precedent is discussed, *infra*.

After our decision in *Holman*, and after the decision of the trial court in this case the Supreme Court in *Smith v. Wade*, 461 U.S. 30, 103 S.Ct. 1625, 75 L.Ed.2d 632 (1983) confirmed that it meant just what it had said in *Parratt v. Taylor* and *Logan v. Zimmerman Brush Co.* In *Smith v. Wade*, which also involved a section 1983 suit against prison officials for failing to prevent fellow prisoners from harming an inmate, a jury awarded both compensatory

this Section is applicable to a sheriff or peace officer, a jailer or warden of a penal institution, officials in charge of a state asylum or hospital for the criminally insane, or to teachers or other persons in charge of a public school. It is also applicable to persons conducting a private hospital or asylum, a private school, and to lessees of convict labor." *See, e.g., Nicoletti v. German Hospital*, 270 A.D. 648 (N.Y.App.Div.), 61 N.Y.S.2d 832, 836 (1946), *affirmed*, 296 N.Y. 936, 73 N.E.2d 117 (1947) (Section 320 duty of care applies to hospital patients); *Daniels v. Anderson*, 195 Neb. 95, 237 N.W.2d 397, 400 (1975) (Section 320 duty of care obliges jailer to take reasonable care to prevent beating by a fellow inmate).

25. *Holman v. Hilton*, 562 F.Supp. 913 (D.C.N.J. 1982).

26. That section of the Tort Claims Act prohibits suits by prisoners against any public entity or public employee while the prisoner is confined. That provision is applicable to Davidson, but the provisions referred to in the text would prohibit a suit for the injuries he suffered in this case even after his release.

and punitive damages. Because the case had been tried as a violation of the eighth amendment, the court's charge to the jury required a finding of gross negligence. On certiorari the defendants conceded liability for compensatory damages, but contended that punitive damages should not have been awarded absent a finding of intentional misconduct. In light of the concession on liability for compensatory damages the Supreme Court had no occasion to consider whether a gross negligence charge was required in every section 1983 action. Reviewing the case law, however, the Court concluded that at common law a finding of "recklessness, serious indifference to or disregard for the rights of others, or even gross negligence" permitted an award of punitive damages. 461 U.S. at 47-48, 103 S.Ct. at 1638. Justice Brennan continued:

> The remaining question is whether the policies and purposes of § 1983 itself require a departure from the rules of tort common law. As a general matter, we discern no reason why a person whose federally guaranteed rights have been violated should be granted a more restrictive remedy than a person asserting an ordinary tort cause of action.

Id. at 49, 103 S.Ct. at 1638. Thus the Court stated unequivocally that section 1983 permitted all the remedies recognized by the common law of torts. One of those remedies is the recovery of damages for the failure of a custodian to take reasonable care to prevent third parties from inflicting harm on those in their custody.[27] In light of *Smith v. Wade*, an intermediate appellate court is not free to read into section 1983 a higher standard for tort liability than the common law has historically recognized.

Even while this appeal was pending the Supreme Court reconfirmed that the key factor in *Parratt v. Taylor* was the availability of a state common law tort remedy, following a negligent deprivation of property. *Hudson v. Palmer*, — U.S. —, 1 S.Ct. 3194, 82 L.Ed.2d 393 (1984). Indeed Chief Justice Burger stated explicitly that *Parratt v. Taylor* "held that a negligent deprivation of property by state officials does not violate the Fourteenth Amendment if an adequate postdeprivation state remedy exists." — U.S. at —, 104 S.Ct. at 3196. In *Hudson* the same rule was applied to intentional deprivations occurring in violations of established state procedures. But the case makes clear that both negligent and intentional deprivations are remediable under section 1983 when, as here, the state has eliminated post-deprivation remedies.

In view of the unbroken line of authorities from *Monroe v. Pape* in 1961 through *Hudson v. Palmer* in 1984 the majority's effort to read into section 1983 a state-of-mind requirement is utterly untenable.

V.

The Majority's Unprincipled Treatment of Precedent

Judge Sloviter's treatment of precedent that should be regarded as controlling is deeply disturbing; the treatment of *Hudson v. Palmer* is particularly so. The decision is mentioned in three contexts.

At one point the majority opinion states that section 1983 "plays an effective role . . . in providing a federal forum to challenge an established state procedure that infringes upon an individual's liberty or property interests, such as . . . the New Jersey statute prohibiting prisoners from bringing tort actions against public officials or employees while confined struck down in *Hudson v. Bolton*, 712 F.2d 854 (3d Cir. 1983)." At 828-830. Why, one must ask, should section 1983 play a less effective role in providing a forum to challenge the far more drastic prohibitions in N.J.Stat.Ann. §§ 59:2-4, 59:3-4, 59:6-2, 59:6

27. Even the dissenters in *Smith v. Wade* did not urge that for compensatory damages a different state of mind than failure to take reasonable care was required. They only urged that more than gross negligence or reckless disregard should be required for the award of punitive damages. *Id.* 461 U.S. at 56, 103 S.Ct. at 1 (Rehnquist, J., dissenting); *id.* at 94, 103 S.Ct. 1650 (O'Connor, J., dissenting).

and 19-5-1(b)(2)? An answer to that obvious question is attempted:

> In the first place, plaintiff here, unlike the plaintiff in *Hobson v. Wilson*, 712 F.2d 824 (D.C.Cir.1983), has not challenged the constitutionality of the statute. Plaintiff's claim, instead, is only for money damages from the defendants for the injuries inflicted by the assault.

At 851. That dismissing description of Davidson's *pro se* pleading—a complaint comprised of a printed form furnished by the district court in which Davidson, following instructions, filled in the blanks—is an outrageous violation of the standards announced in *Haines v. Kerner*, 404 U.S. 519, 92 S.Ct. 594, 30 L.Ed.2d 652 (1972) for measuring the sufficiency of a *pro se* litigant's pleading. It disregards, moreover, the concluding prayer in the complaint for "[s]uch other relief equitable and just that the Court deems just and appropriate." App. Da 4. Had counsel been appointed in the district court there might be some justification for distinguishing *Hobson v. Wilson* by insisting that Davidson had failed to plead his legal theories with sufficient specificity. In fact, however, Davidson proceeded *pro se* throughout the trial, and counsel was appointed for him only in this court. Plainly Judge Bowman who conducted the trial assumed throughout that Davidson was pursuing relief under section 1983 because the Tort Claims Act prohibited him from recovering from Cannon and Jones under state law. That is the same issue decided in *Hobson v. Wilson*, and discussed by the Supreme Court in *Monroe v. Pape*, 365 U.S. 167, 183, 189 S.Ct. 492, 500, 42 L.Ed.2d 492 (1961), a case which Judge Bowman cites in his opinion. App. Da 18. The suggestion that the interrelationship between the Tort Claims Act and section 1983 was not presented, and litigated, is an insult to Judge Bowman's considerable intelligence. In his own words, quoted in the margin, [illegible] any doubt about the issues which were presented to him, and which he tried.[*]

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[*] Judge Bowman wrote:

> The first step is to inquire whether the assault here implicates a "liberty interest" protected by the due process clause. Freedom from physical attack and injury undeniably falls within the compass of constitutionally protected liberty. To be free of personal violence is the basic core of liberty. "To be free from, and to obtain judicial relief for, unjustified intrusions on personal security . . . [is one of] the historic liberties" protected at common law and by the due process clause. *Ingraham v. Wright*, 430 U.S. 651, 672–73 [97 S.Ct. 1401, 1413, 51 L.Ed.2d 711] (1977). *See Youngberg v. Romeo*, 457 U.S. 307, 102 S.Ct. 2452 [73 L.Ed.2d 28] (1982). Even while incarcerated, plaintiff enjoys a constitutionally protected interest in conditions of reasonable care and safety.
>
> Defendants emphasize that plaintiff seeks to recover damages for a single attack. They refer us recent statements by the court of appeals that "[t]he right to protection is not activated by an isolated mishap, or called into question by each lesion that a person [here, prisoner] may suffer," and that "[t]here is no guaranteed an injury-free life." *Bowers v. Youngberg*, 666 F.2d 147, 162 (D.C.Cir.1980), *vacated and remanded*, 457 U.S. 307, 102 S.Ct. 2452, 73 L.Ed.2d 28 (1982). But as defendants have also pointed out, the critical aspect is not the weight of the interest, but its nature. *Board of Regents v. Roth*, 408 U.S. 564, 570–71 [92 S.Ct. 2701, 2705–06, 33 L.Ed.2d 548] (1972). Thus the first analytical step is whether security from assault is within the ambit of "liberty." Whether the assault is aggravated or repeated does not alter its nature, but simply its weight.
>
> Furthermore, the instant case is not about a "brush" or an inadvertent accident. It does not involve mere "de minimis" personal injury, but a vicious and unwarranted attack inflicting severe wounds. The defendants were personally apprised of the anticipated assault, and knowing of McMillian's violent character, did nothing to prevent its occurrence. Had reasonable precautions been taken, even as simple as issuing a warning to McMillian, the evidence suggests that plaintiff would not have been injured. Defendants knew that McMillian represented a "special danger" to plaintiff. *Cf. Sherrer v. Calabrese*, 665 U.S. 277, 283 [108 S.Ct. 553, 559, 62 L.Ed.2d 481] (1988).
>
> Defendants argue that plaintiff did not enjoy a "liberty interest" in his personal security because defendants did not intentionally permit the attack, but were merely negligent about his safety. This argument confuses the nature of liberty interest with the nature of deprivation. State of mind has no relevance for purposes of identifying what is a liberty interest and what is not.
>
> Rather, we believe defendants' argument is that state of mind is significant for purposes

The heart of the majority opinion, however, is its final "distinction" of *Holmes v. Hilton*. Judge Stevens writes:

> In the second place, a claim for procedural due process must be predicated on deprivation of a substantive right or interest created by the Constitution, a statute or other entitlement. . . . Since we have rejected Davidson's claim that his substantive right under the Fourteenth Amendment was deprived by defendants' negligence, and there has been no claim of a statutory or other entitlement, there is nothing to trigger an inquiry into what process is due.

At 621. There are two ways in which these characteristic sentences may be read. One possible reading is that *Holmes v. Hilton* survives, with respect to property interests created by state positive law, but does not apply to loss of life or invasion of bodily security. The other is that the failure to take reasonable care to prevent a loss of property does not amount to a deprivation of property.

If, as I suspect, the first reading is what is intended, then the majority opinion is an example of perverse obverse *Lochnerism*. The fundamental error of *Lochner v. New York*, 198 U.S. 45, 25 S.Ct. 539, 49 L.Ed. 937 (1905) was the Court's attempt to remove contract, which was always a matter of positive property law, from the reach of law by converting contract into a liberty interest. The object, and temporarily result, was to preserve the status quo between employers and employees. What the majority is doing is worse. Rather than elevating property interests to the status of liberty interests, it downgrades the latter by holding that they shall receive less protection than has been afforded the former.

If, on the other hand, what is intended is that the negligent destruction of property absent a state post-destruction remedy, does not a deprivation within the fourteenth amendment, then *Holmes v. Hilton*, a decision only 14 months ago, has proved to be "a restricted railroad ticket, good for this day and train only." *Smith v. Alabama*, 124 U.S. 465, 469, 8 S.Ct. 564, 566, 31 L.Ed. 487 (1914) (Roberts, J., dissenting). Of course the Court *en banc* is free to play fast and loose with its own precedents, however concise that course may be.

The court *en banc* is not similarly free, however, to play fast and loose with the Supreme Court's precedents. The case discussed in Part IV above cannot, consistently with our position as an intermediate court, be given the short shrift treatment reflected in Judge Stevens's opinion. Moreover cases on which that opinion relies, not discussed in part IV, do not support the reversal of Davidson's judgment. Several of those cases require special attention.

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of determining whether the defendant deprived plaintiff of his liberty. Defendants suggest that unless the actions of the state officials were intentional, reckless, or malicious, there has been no "deprivation" of rights. But as we have discussed in our prior opinions, the Supreme Court has held that a state official's negligence is sufficient to constitute a "deprivation" for due process purposes. Parratt v. Taylor, 451 U.S. 527 [101 S.Ct. 1908, 68 L.Ed.2d 420] (1981). We do not agree with defendants that Parratt's holding regarding negligent deprivations is irrelevant to the present case on the ground that Parratt involved a property rather than a liberty interest. We do not believe these categories are so rigid. The distinction between property and liberty interests does not alter the relevant reasoning, which is that § 1983 does not include a requirement that the official's act be intentional. Defendants assert that we should impose a "deliberate indifference" standard borrowed from the Eighth Amendment. Estelle v. Gamble, 429 U.S. 97 [97 S.Ct. 285, 50 L.Ed.2d 251] (1976). This standard was rejected as inappropriate under due process analysis in Youngberg v. Romeo, [457 U.S. 307], 102 S.Ct. at 2456 n. 11.

Defendants Cannon and James, acting under authority of state law, negligently deprived plaintiff of his liberty interest of reasonable freedom from physical assault. This brings us to the second step of due process analysis, to inquire whether the state has provided the "process" which is due under the circumstances. As we discussed in our prior opinion, New Jersey provides plaintiff adequate process whatsoever by which to pursue a remedy against the state or state officials. . . . [Injuries inflicted by another prisoner . . .] [See Ann. 59:5-2 (West 1982).

App. Op. 19-20a 20 (footnotes omitted).

Judge Sloviter quotes *Estelle v. Gamble*, 429 U.S. 97, 106, 97 S.Ct. 285, 292, 50 L.Ed.2d 251 (1976) in support of the proposition that a state may relieve its agents of the duty to take reasonable care to prevent harm to persons entrusted to their custody. At 836. Like so much else in her opinion the quotation, taken out of context, is used for a misleading purpose. Unlike the states of New Jersey and California, Texas did not relieve its agents rendering medical care to prisoners of the duty of reasonable care. A post-treatment negligence action was available in the Texas courts. 429 U.S. at 107, 97 S.Ct. at 293 (referring to Tex.Civ.Code Ann. art. 6252-19 (Vernon 1970 & Supp.1984)). An examination of the petition for certiorari discloses quite clearly that it did not present any issue relevant to this case. The petitioners construed the *pro se* complaint as one presenting an eighth amendment claim, and none other. The response to the petition by court appointed counsel and the briefs filed by both sides all proceed on the same assumption. 429 U.S. at 101-02, 97 S.Ct. at 289-90. Nothing was decided in *Estelle v. Gamble* other than that the eighth amendment required a showing of more than negligence. That case cannot be treated as authority for state power to relieve custodians, or even physicians, of the duty to take reasonable care.

Judge Sloviter similarly attempts to wring from *Paul v. Davis*, 424 U.S. 693, 96 S.Ct. 1155, 47 L.Ed.2d 405 (1976) support for the proposition that custodians may be relieved of the obligation to take reasonable care to prevent harm. At 836. Once again a quotation, taken out of context, is used for a misleading purpose. *Paul v. Davis* holds that absent some expectation created by state law there is no substantive interest to be protected by the due process clause. That holding is in my view unfortunate, since it misses the point that human personality has a psychological as well as a physical component, either of which is susceptible to injury. That notwithstanding the holding has no relevance to this case, for here the injury to Davidson was plainly physical. Moreover this court holds unanimously that entirely aside from state positive law there is a liberty interest in personal security from physical injury. Thus Judge Sloviter's reliance on *Paul v. Davis* in Part IV of her opinion is inconsistent with the analysis made in Part III, in which the entire court joins.

Judge Sloviter also opines that the court's "holding avoids the anomalies that would result ... were a prisoner to be entitled under the Constitution to a higher standard of care than an involuntarily committed mental patient, *see Youngberg v. Romeo*, 457 U.S. 307 [102 S.Ct. 2452, 73 L.Ed.2d 28] (1982)." At 831 n. 9. Plainly, then, the majority assumes that *New Jersey* can, as it has done, validly relieve custodians of the mentally ill and the mentally retarded of the duty to take reasonable care to prevent harm from befalling those unfortunates. *Youngberg v. Romeo* announced no such unwritten doctrine. As Part III of the majority opinion concedes, *Romeo* recognizes a liberty interest in freedom from bodily harm. In determining the standard of care appropriate for the protection of that interest, the Supreme Court adopted the standard proposed by Chief Judge Seitz in this court: the exercise of accepted professional judgment. 457 U.S. at 321, 323, 102 S.Ct. at 2461, 2462. That standard is the standard of the common law. Moreover it is precisely the standard from which Cannon and James departed. They failed to discharge their duties as professional custodians of prisoners in accordance with the accepted standards of that calling. The trial court so found, and this court agrees, unanimously, that this finding is not clearly erroneous. Judge Sloviter's treatment of *Youngberg v. Romeo* is nothing less than a backhanded rejection of the standard of care which it announced. This development bodes ill not only for prisoners but also for the involuntarily committed everywhere in this circuit.

Finally, Judge Sloviter's oblique suggestion that the "conduct that shocks the conscience" language in *Rochin v. California*, 342 U.S. 165, 172, 72 S.Ct. 205, 209, 96 L.Ed. 183 (1952) establishes the standard of

liability for section 1983 cases, because "[t]he Court did not say whether anything less would suffice," at 880, is incomprehensible. That case was a direct criminal appeal involving the issue whether evidence obtained by use of a stomach pump could be admitted in a criminal trial. Justice Frankfurter wrote:

> The fertilities of the Due Process Clause may be indefinite and vague, but the modes of their ascertainment is not self-willed. In each case "due process of law" requires an evaluation based on a disinterested inquiry pursued in the spirit of science, on a balanced order of facts exactly and fairly stated, on the detached consideration of conflicting claims, . . . on a judgment not *ad hoc* and episodic but duly mindful of reconciling the needs both of continuity and of change in a progressive society.
>
> Applying these general considerations to the circumstances of the present case, we are compelled to conclude that the proceedings by which this conviction was obtained do more than offend some fastidious squeamishness or private sentimentalism about combatting crime too energetically. This is conduct that shocks the conscience.

Id. (citation omitted). The suggestion that the descriptive phrase in the last quoted sentence defined, for Justice Frankfurter, or any other Justice, the maximum content of the due process clause in a personal liberty context, is simply preposterous. Even if this untenable suggestion were to be adopted as the relevant standard, New Jersey's statutory abrogation of the duty of custodians to take reasonable care to prevent harm from befalling those it has incarcerated may not shock the majority's conscience, but it surely shocks mine.

VI.

The Absence of Caseload Benefits

Some of those joining in the majority opinion are engaged, one suspects, in a quixotical quest for devices which will make our burgeoning caseload disappear. The gross negligence standard which has been adopted by the majority as the due process minimum will afford no relief in this respect. The pleadings in this case illustrate the problem perfectly. The complaint was made on the district court's printed form, tailored for prisoners' use. In Part IV of the form, captioned "Statement of Claim" the *pro se* litigant is instructed:

> State here as briefly as possible the *facts* of your case. Describe how each defendant is involved. Include also the names of other persons involved, dates and places. Do not give any legal arguments or cite any cases or statutes.

App. Do 3 (emphasis in original). The instructions are consistent with the pleading standards announced in *Haines v. Kerner*, 404 U.S. 519, 92 S.Ct. 594, 30 L.Ed.2d 652 (1972) and *Conley v. Gibson*, 355 U.S. 41, 78 S.Ct. 99, 2 L.Ed.2d 80 (1957). Davidson followed them, by simply stating what transpired. He did not mention any standard of care. The court could not rule on the basis of his statement of claim rule as a matter of law that he would be unable to establish gross negligence. Moreover, even if the majority were to impose a requirement that these magic words be included, they would soon appear in every *pro se* or counseled complaint seeking money damages.

Moreover, even at trial the distinction between gross negligence and failure to take reasonable care under the circumstances is not one that is susceptible of application as a matter of law.

> The prevailing view is that there are not "degrees" of care or negligence, as a matter of law; there are only different amounts of care as a matter of fact, and "gross" negligence is merely the same thing as ordinary negligence, "with a little addition," as Baron Bolle once put it, "a vituperative epithet."

W. Prosser, Handbook of the Law of Torts 182 (4th ed. 1971) (footnotes omitted). In every case the facts still will have to

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88. See note 11 *supra*.

developed, and the case will be new, indeed, when a trial court will discern a line between "gross" and "ordinary" negligence clear enough to grant a summary judgment or to direct a verdict which would not otherwise have been granted.

VII.

The Necessity of a Remand

What I have said about the fact-sensitive distinction between the pejorative "gross" negligence and the equally pejorative "mere" negligence suggests that even on the majority's analysis the proper result should be a remand. Obviously Davidson, *pro se* litigant, was unaware of the metaphysical distinction which the majority has invented. Moreover Judge Eveleigh, because he relied on the plain statement in *Parrott v. Taylor* that negligence sufficed, did not consider whether the conduct of Cannon and James amounted to gross negligence. The case was tried non-jury. The trial court heard the testimony and saw the demeanor of the witnesses. At the very least that court should be afforded an opportunity to reappraise the evidence in light of the new standard which the majority announces.

VIII.

Conclusion

The holding in this case, that custodians of the involuntarily committed may be relieved of the duty to take reasonable care to prevent harm to persons committed to their charge who are deprived of the ability to resort to self help, is inconsistent with settled Supreme Court case law, inhumane, and indecent. The judgment in Davidson's favor should be affirmed. At the very least the case should be remanded so that the trial court may reconsider the evidence in light of the new standard which the majority announces. I dissent.

A. LEON HIGGINBOTHAM, Circuit Judge, dissenting.

I dissent for the substantive reasons stated in the opinions of Judges Seitz and Gibbons. I would affirm the judgment of the court below.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 82-5743

ROBERT DAVIDSON

vs.

EDWARD O'LONE, Supt., JOSEPH CANNON, Ass't. Supt., ARTHUR JONES, Hearing Off., SGT. ROBERT JAMES, Internal Affairs

Joseph Cannon and Robert Jones, Appellants

(D.N.J. Civ. No. 82-5743)

Present: SEITZ, Chief Judge, and ALDISERT, ADAMS, GIBBONS, HUNTER, WEIS, GARTH, HIGGINBOTHAM, SLOVITER and BECKER, Circuit Judges.

O R D E R

A majority of the active judges having voted for rehearing in banc in the above, it is ORDERED that the Clerk of this Court list the above case for rehearing before the court in banc at the convenience of the Court.

BY THE COURT.

Circuit Judge

DATED: March 22, 1984

United States Court of Appeals

FOR THE THIRD CIRCUIT

No. 82-5743

ROBERT DAVIDSON

vs.

EDWARD O'LONE, Superintendent,
ARTHUR JONES, Hearing Officer,
JOSEPH CAMPION, Superintendent and
ROBERT JAMES, Internal Affairs

JOSEPH CAMPION and ROBERT JAMES, Appellants

(D. C. Civil No. 81-253)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE ——— DISTRICT OF NEW JERSEY - Camden

Present: ALDISERT, Chief Judge *, SEITZ, GIBBONS, HUNTER, WEIS, GARTH, HIGGINBOTHAM, SLOVITER and BECKER, Circuit Judges

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the District of New Jersey and was argued by counsel December 1, 1983, and re-argued before the Court in banc May 7, 1984.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court, entered October 15, 1982, be, and the same is hereby reversed and the cause is remanded to the said District Court which is directed to enter judgment for the defendants. Costs taxed against appellee.

ATTEST:

Clerk

December 27, 1984

* At the time of the reargument in banc, Judge Seitz was Chief Judge.

Certified as a true copy and issued in lieu of a formal mandate on January 30, 1985

Test: M. Edgehill Seymour

Chief Deputy Clerk, United States Court of Appeals for the Third Circuit.

EDITOR'S NOTE

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Supreme Court, U.S.
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CLERK

No. 84-6470

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1984

ROBERT DAVIDSON,

Petitioner

v.

JOSEPH CANNON and
ROBERT JAMES,

Respondents

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

BRIEF IN OPPOSITION

IRWIN I. KIMMELMAN
ATTORNEY GENERAL OF NEW JERSEY
Attorney for Respondents,
Joseph Cannon and Robert James
Richard J. Hughes Justice Complex
CN 112
Trenton, New Jersey 08625
(609) 633-7089

JAMES J. CIANCIA
Assistant Attorney General
Of Counsel

MADELEINE WATERS MANSIER*
Deputy Attorney General
On the Brief

*Counsel of Record

QUESTIONS PRESENTED

1. When there is no serious conflict over whether a merely negligent failure to protect a prisoner from a single, isolated attack by another person constitutes a deprivation of a substantive due process liberty interest, should not this Court decline review?

2. When the decision by the court below that the mere negligence of the prison officials lacked the outrageousness or official abuse of power needed to rise to the level of a deprivation of a constitutional right, which decision is fundamentally consistent with the procedural due process analysis in Parratt v. Taylor and is expressly consistent with prior decisions by this Court, should not this Court decline review?

3. Because the absence of a deprivation of a substantive right negates any inquiry into what process is due, thereby rendering Parratt v. Taylor inapplicable, should not this Court decline review?

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COUNTERSTATEMENT OF THE CASE

Petitioner, seeking a writ of certiorari in this Court, claims that the Court of Appeals for the Third Circuit acted improperly when it reversed the decision of the District Court and dismissed his complaint. In fact, the decision of the Third Circuit was perfectly proper and in accord with prior decisions of the Supreme Court. This case presents no legal issues which warrant consideration by this Court.

Petitioner, an inmate in the New Jersey State Prison, filed a complaint in the United States District Court for the District of New Jersey on January 27, 1981, alleging that respondents, prison officials had violated the Eighth and Fourteenth Amendments of the Constitution by failing to protect him from assault by another inmate. Petitioner had been threatened by an inmate named McMillian following a disciplinary hearing involving the two men. Petitioner wrote a note about the threat which, according to his own testimony at trial, was not for the purpose of his own safety, but for the purpose of going on record as not being responsible for whatever further trouble might develop between McMillian and him. The note eventually reached respondent Cannon, Assistant Superintendent, who forwarded it to respondent James, Internal Affairs. Thereafter, McMillian did attack petitioner, causing injury.

The matter was tried before the Honorable Stanley S. Brotman, U.S.D.J. The district court found that respondents negligently failed to protect Davidson, which negligence was a proximate cause of petitioner's injuries. The district court concluded that petitioner had not established a claim of cruel and unusual punishment in violation of the Eighth Amendment because they "did not act with deliberate or callous indifference to [petitioner's] needs and because the incident complained of was a single attack" (5A-6A). However, the district court found that petitioner had a "liberty

interest in remaining free from physical assault" (8A), that respondents were negligent, that their negligence deprived petitioner of his liberty interest, and that the deprivation was without due process of law because the New Jersey Tort Claims Act provides that a public employee is not liable for an injury caused by one prisoner to another.

Respondents appealed to the United States Court of Appeals for the Third Circuit. Following oral argument before a panel of that court, the Third Circuit, on its own motion, ordered reargument before the court en banc. The court en banc reversed, holding that respondents were negligent and that petitioner had a substantive Fourteenth Amendment liberty interest in the form of a right to personal security, but the conduct of respondents did not rise to the level of depriving petitioner of his substantive liberty interest. "When the only finding is that of mere negligence, as here, we cannot find the 'outrageousness' or abuse of official power that warrants raising the tortious conduct of the prison official to the level of a deprivation of constitutional right within the scope of §1983" (24A). Since there was no deprivation of a protected interest, and since there was no claim of a statutory or other entitlement, there was "nothing to trigger an inquiry into what process [was] due" (25A).

REASONS FOR DENYING THE WRIT

1. There is No Serious Conflict of Authority Which Requires an Authoritative Decision of This Court.

Petitioner argues that this Court determined in Parratt v. Taylor, 451 U.S. 527 (1981), that a loss of property as a result of state action was actionable under 42 U.S.C. §1983 even if the state action was only negligent. Petitioner argues further that in the wake of Parratt the courts of appeals have split on the issue

of whether a loss of liberty as a result of state action which is merely negligent is actionable under §1983.

Assuming arguendo that petitioner even had a liberty interest here,[1] his reasoning is flawed. This Court did not "hold" in Parratt that a negligent loss of property was actionable because this Court's focus in that case was on procedural, not substantive, due process. More precisely, this Court determined that regardless of whether his loss of property as a result of negligent state action was actionable or not, a question of substantive due process, Taylor's loss was not without procedural due process; so his complaint failed to state a §1983 cause of action.

Furthermore, there is no serious conflict among the courts of appeals on the issue of whether a prisoner who claims a loss of liberty as a result of a merely negligent failure by state officials to protect him from assault by another inmate states a cause of action. The decision of the Third Circuit that it does not is not in conflict with the decision of any other circuit and is expressly in agreement with the Fourth, Seventh and Eighth Circuits.

In an attempt to demonstrate a conflict, among the courts of appeals petitioner first cites Daniels v. Williams, 720 F.2d 792 (4th Cir. 1983), rehearing en banc granted (August 29, 1983) as an example of the Fourth Circuit's determination that a prison inmate's loss of liberty as a result of negligent state action constitutes an actionable deprivation that may give rise to a procedural due process claim under §1983. Petitioner has failed to note that the Fourth Circuit, on rehearing en banc, held that "Daniel's bodily injury occasioned by simple negligence was not a liberty

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[1] A determination by this Court that petitioner had no liberty interest here would constitute a perfectly proper basis for affirming the decision of the Third Circuit.

interest protected by the due process clause." Daniels v. Williams, 748 F.2d 229, 230 (4th Cir. 1984). In reaching that decision, which is in complete agreement with the Third Circuit's decision, the Court relied on this Court's opinion in Parratt, quoting Baker v. McCollan, 443 U.S. 137 (1979), wherein the elusiveness of the present issue was acknowledged, and thus the Fourth Circuit concluded, "We do not believe the Court intended Parratt to be applied automatically in a per se manner in every instance in which an act of negligence can also be stated as a §1983 claim." Daniels v. Williams, 748 F.2d 229, 231 (4th Cir. 1984).

Petitioner's reliance on decisions in the Fifth and Ninth Circuits to demonstrate a conflict requiring resolution by this Court is equally unavailing. Although the Fifth Circuit in Thibodeaux v. Bordelon, 740 F.2d 329 (5th Cir. 1984), determined that the complaint, which alleged a negligent failure to protect, stated a cause of action, the plaintiff was a pretrial detainee, not a convicted prisoner, and therefore entitled to a fuller panoply of rights. The Ninth Circuit in Haygood v. Younger, 718 F.2d 1472 (9th Cir. 1983), rehearing en banc granted, 729 F.2d 613 (March 28, 1984), also impliedly recognized a cause of action for a negligent deprivation of liberty, but that was based on the court's definition of liberty as "wrongful incarceration," id. at 1480, not a negligent failure to protect, such as alleged by petitioner here.

Petitioner himself articulates doubt about whether the Seventh Circuit's decisions demonstrate a conflict with the Third Circuit's decision here. In fact, as a close reading of petitioner's own brief reveals, there is no conflict between those two courts of appeals. They agree that an isolated instance of negligent failure to supervise or protect a prisoner "does not rise to the level of a constitutional deprivation." State Bank v. Camic, 712 F.2d 1140, 1143 (7th Cir. 1983), cert. denied, ____ U.S. ____, 104 S.Ct. 491 (1983). As petitioner acknowledges, this view is

shared by the Eighth Circuit, Mills v. Smith, 656 F.2d 337 (8th Cir. 1981).

In the absence of any serious conflict among the courts of appeals, this Court should deny the writ.

2. The Decision by The Court Below Is Fundamentally Consistent With The Decision of This Court in Parratt v. Taylor and Is Expressly Consistent with Earlier Supreme Court Rulings; So No Review by This Court Is Needed.

Petitioner claims that the decision of the Third Circuit is fundamentally inconsistent with this Court's decision in Parratt v. Taylor, 451 U.S. 527 (1981), thereby requiring review by this Court. Petitioner is mistaken. The decision below is quite consistent with Parratt, and indeed with many other Supreme Court decisions. No review is needed.

Petitioner does not question the Third Circuit's determination, and indeed that of the District Court, that "nothing in the Court's cases [prior to Parratt] provides any support for the principle that negligent conduct by a state official causing injury to the person constitutes a deprivation of a Fourteenth Amendment right which can be redressed in a §1983 suit (20A). Although the Supreme Court had granted certiorari twice to resolve that very issue, it did not because it disposed of both cases on other grounds. In Procunier v. Navarette, 434 U.S. 555 (1978), this Court decided the case on the basis of the defense of qualified immunity. The next year this Court decided Baker v. McCollan, 443 U.S. 137 (1979) by finding that no constitutional right was implicated in the first instance.

Then in 1981 the Supreme Court decided Parratt. Although this Court suggested that it would attempt once again to resolve the issue of whether mere negligence will support a claim for relief under §1983, once again this Court decided the case before

it on other grounds. In Parratt this Court recognized at the outset that it did not matter whether Taylor had been "deprived" of his property by the negligence of the prison officials because, regardless of whether negligence amounted to a deprivation within the meaning of §1983 or not, the complaint failed to state a cause of action because of the availability of a state remedy. In short, even if there were a deprivation of his substantive right (an issue not analyzed or decided), such an alleged deprivation was not without procedural due process. The analysis by this Court was purely one of procedural, not substantive, due process. Since an acceptable procedure was available, thereby precluding a cause of action, this Court did not reach, because it did not need to reach, the issue of whether the alleged negligent state action constituted a deprivation within §1983 at all.

Consequently petitioner mischaracterizes the Parratt decision when he says, "this Court proceeded to hold that negligent state action resulting in the loss of a prison inmate's hobby kit 'unquestionably' amounted to a deprivation within the meaning of the Fourteenth Amendment." (Petitioner's brief at 10; emphasis supplied). That was not a "holding." That was merely a statement of this Court's assumption arguendo that enabled the Court to reach the procedural due process issue on which that case could so easily and so properly be disposed of.

Equally important, the decision by the court below is expressly consistent with prior decisions of this Court when this Court did undertake a substantive due process analysis of a liberty interest. One such case is cited with approval by this Court in Parratt and by both the Third Circuit and the district court below. In Ingraham v. Wright, 430 U.S. 651 (1977) this Court decided that to establish a deprivation of a substantive due process interest in liberty, the official conduct must exceed "a de minimis level of imposition with which the Constitution is not concerned." Id. at

674. There must be an abuse of government power. Id. at 731. Accord, Monroe v. Pape, 365 U.S. 1967, 172 (1961); Meyer v. State of Nebraska, 262 U.S. 390 (1923). The official conduct must "shock the conscience." Rochin v. California, 342 U.S. 165, 172 (1952).

In light of the requirements established by this Court for stating a cognizable claim of a violation of a liberty interest, it is clear that the Third Circuit correctly held

> When the only finding is that of mere negligence, as here, we cannot find the 'outrageousness' or abuse of official power that warrants raising the tortious conduct of the prison official to the level of a deprivation of constitutional right within the scope of §1983 [24A].

In conclusion, since the decision of the Third Circuit in analyzing an issue of substantive due process is not fundamentally inconsistent with this Court's determination of a procedural due process issue in Parratt, and since the Third Circuit's analysis is extremely consistent with this Court's earlier rulings concerning a substantive due process liberty interest, this Court should deny the writ.

3. The Third Circuit Properly Determined That in the Absence of a Deprivation of a Substantive Right No Process Is Due; So the Procedural Due Process Analysis in Parratt v. Taylor Is Not Applicable and No Review by This Court is Needed.

Petitioner argues that this Court should grant his writ simply because he has sued prison officials for injuries sustained when he was attacked by another prisoner and the New Jersey Tort Claims Act provides that "[n]either a public entity nor a public employee is liable for ... any injury caused by ... a prisoner to any other prisoner. N.J.S.A. 59:5-2(b)(4). Petitioner apparently thinks that the existence of the immunity automatically provides him with a civil rights cause of action in federal court. That

claim was expressly rejected in Martinez v. California, 444 U.S. 277, 281-283 (1980).

The obvious flaw in petitioner's reasoning is that 42 U.S.C. §1983 expressly requires a "deprivation" of rights. The Fourteenth Amendment prohibits the deprivation of liberty, inter alia, without due process of law. Only deprivations require due process. Where there is no deprivation (see the opinion of the court below and Point 2, supra), one never reaches the issue of whether what was done was done with or without due process.

Moreover, although petitioner claims that he does not ask this Court "to wrestle with the difficult question of [Parratt's] general relation to the various doctrines of sovereign immunity" (Petitioner's brief at 16), that is precisely what might be required if this Court were to grant the writ on the basis of petitioner's third argument.

Since there is no procedural due process analysis required in the absence of a deprivation of a substantive right, as here, Parratt's analysis of state remedies is not implicated; so this Court should deny the writ.

CONCLUSION

For all of the foregoing reasons, this Court should deny the petition for a writ of certiorari.

Respectfully submitted,

IRWIN I. KIMMELMAN
ATTORNEY GENERAL OF NEW JERSEY
Attorney for Respondents,
Joseph Cannon and Robert James

By: Madeleine Waters Manzier
Madeleine Waters Manzier
Deputy Attorney General

JAMES J. CIANCIA
Assistant Attorney General
Of Counsel

Dated: April 29, 1985

EDITOR'S NOTE

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Supreme Court, U.S.
FILED
MAY 14 1985
ALEXANDER L. STEVAS
CLERK

No. 84-6470

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1984

ROBERT DAVIDSON,

Petitioner,

v.

JOSEPH CANNON and
ROBERT JAMES,

Respondents.

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

James D. Crawford
Attorney for Petitioner

Julie A. Waddell
SCHNADER, HARRISON, SEGAL & LEWIS
Suite 3600
1600 Market Street
Philadelphia, Pennsylvania 19103
(215) 751-2162

Of Counsel.

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On February 19, 1985, this Court granted the petition for a writ of certiorari to the United States Court of Appeals for the Fourth Circuit in Daniels v. Williams, ___ U.S. ___, 105 S. Ct. 1168 (1985). That grant of certiorari means that the Court will have before it two issues concerning how to define the boundaries of this Court's decision in Parratt v. Taylor, 451 U.S. 527 (1981): First, did Parratt determine that negligence by prison officials can give rise to a prisoner claim under § 1983 or did it merely hold that the existence of a state remedy does away with the possibility of a § 1983 action? Second, under what circumstances, if any, does a prisoner have a cause of action for negligence resulting in injuries to life and liberty, in contrast to deprivations of property?

Although those issues are framed in both Daniels and the present case, so that a reversal in Daniels would require a reversal in this case, there are important distinctions between the two cases which make this case, rather than Daniels, the ideal vehicle for resolving these Parratt issues. Unlike Daniels, the present case involves negligent state action which has a peculiar relationship to petitioner's status as a prisoner. And unlike the petitioner in Daniels, petitioner in the present case has no arguable state remedy for his claims against the negligent jailers.

For each of these reasons, a writ of certiorari should be granted in the present case and this case should be set down for argument together with Daniels v. Williams.

I. THIS CASE, LIKE PARRATT, PRESENTS A NEGLIGENCE CLAIM WHICH AROSE BECAUSE PETITIONER WAS IN CUSTODY

Because the petitioner in Parratt brought a claim which could be heard and remedied under state procedures, this

Court had no reason to discuss in depth what characteristics would distinguish a negligence claim which could be brought under § 1983 absent a state remedy. It is clear, however, that the claim in Parratt was not a generalized negligence claim unrelated to his custody as a state prisoner; if he had not been in custody, he could have arranged to receive his mail directly from the carrier rather than have it go through his custodians' hands. To the degree that the relationship of the tort to the victim's custodial status was material to the decision in Parratt, this case, rather than Daniels, provides the ideal vehicle for exploring the boundaries of the Parratt decision.

In both Daniels and the present case, the negligence of a state employee caused physical injury to a prison inmate. However, the difference between the type of negligence involved in the two cases is striking. Daniels is an undisputed case of "simple negligence." The inmate there slipped and fell on pillows and newspapers which a deputy sheriff had left lying on the stairs. Daniels was injured by the sort of careless conduct that could befall any ordinary citizen; in short, by negligence that was completely unrelated to the responsibilities imposed upon the sheriff by reason of the unique demands and circumstances of prison life. 748 F.2d at 231.

By contrast, petitioner was victimized by the type of negligence that can arise only within the restrictive confines of the prison walls. Davidson was injured because prison officials negligently failed to protect him from the forewarned physical assault of another inmate. Just as the state has complete control over an inmate's property, the case in Parratt, it exercises absolute authority over the inmate's ability to protect himself from the attacks of other prisoners. Within the

confines of the prison cell, a threatened inmate cannot flee, defend himself, or seek the protection of the courts. He is utterly dependent upon the state for security from intentional assaults by other prisoners. When the state negligently breaches its obligation to protect an inmate in this respect, the inmate suffers an injury which could not ever befall a citizen not in custody.

II. THIS CASE, UNLIKE EITHER PARRATT OR DANIELS, PRESENTS A RECORD IN WHICH IT IS UNDISPUTED THAT PETITIONER HAS NO REMEDY APART FROM § 1983

Although this Court granted certiorari in Parratt specifically to resolve the question of whether simple negligence could give rise to a § 1983 action, § 1983 relief was eventually denied on the ground that the prisoner had state remedies available for his claim. Although this Court's Parratt analysis and traditional principles of constitutional jurisprudence make it clear that Parratt established a general principle that negligence can give rise to a § 1983 violation absent a state remedy, majorities of the courts in banc in both Daniels and the present case have held that, at least where liberty rather than property interests are involved, Parratt did not establish a cause of action for the negligent deprivation of a prisoner's constitutional rights.[1] The grant of certiorari in Daniels, if it is to clarify the law in this area, must reach the question on which certiorari was granted in Parratt.

If, as petitioner believes, this Court in Parratt held that § 1983 would support a cause of action for negligent loss

---

1. The majority of the court in banc in the present case, indeed, considered Parratt's language asserting that negligence could give rise to a § 1983 action mere dictum, see 752 F.2d at 826, a determination at odds with the decisions of Fourth, Fifth, Seventh, and Ninth Circuits.

of a prisoner's property absent an alternative state remedy, it also expressed a real concern that available state remedies be used to prevent § 1983 from becoming "a font of tort law" to be superimposed on existing state law. 451 U.S. at 544, quoting Paul v. Davis, 424 U.S. 693, 701 (1976). Accordingly, this Court will be under great pressure to decide the Daniels case on the same grounds on which it decided Parratt if an alternative state remedy is available.

Of course, the petitioner in Daniels argues, as does petitioner Davidson in this case, that the availability of an alternative state remedy should not foreclose a § 1983 suit where the injury has been to life or liberty, rather than property interests. If the Court resolves that question in Daniels' favor, that decision will require reversal in the present case as well. But the history of the cases in which this Court has granted certiorari to resolve the question of whether negligence can give rise to a § 1983 action -- from Procunier v. Navarette, 434 U.S. 555 (1978), through Baker v. McCollan, 443 U.S. 137 (1979), to Parratt v. Taylor, 451 U.S. 527 (1981) -- suggest that the direct answer to that question is more elusive than the Court or any of those who litigate in the federal system might expect.

If this Court does determine that the Parratt analysis applies equally to life and liberty as to property, there is a grave danger that the Court once more will be frustrated by the facts from handing down a definitive opinion on an issue it will have addressed four times. Although the petitioner in Daniels asserts that there is no meaningful remedy under state law, both the panel of the court of appeals and the court sitting in banc have ruled that the state remedy available under Virginia law

1058-85-10723

No. 84-6470

IN THE
SUPREME COURT OF THE UNITED STATES
OCOTBER TERM, 1984

ROBERT DAVIDSON,

Petitioner,

v.

JOSEPH CANNON and
ROBERT JAMES,

Respondents.

CERTIFICATE OF SERVICE

I hereby certify that I am a member of the Bar of this Court and that on this 13th day of May, 1985, one copy of the Reply Brief in Support of Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit in the above-captioned case was to my personal knowledge, served on the following person by first-class mail, postage prepaid:

Madeleine W. Mansier, Esquire
Office of the Attorney General
Richard J. Hughes Justice Complex
CN 116
Trenton, New Jersey 08625

and that she is the only person who must be served.

James D. Crawford
Suite 3600, 1600 Market Street
Philadelphia, Pennsylvania 19103
(215) 751-2162

Attorney for Petitioner

satisfies any requirement of due process to which Daniels was entitled. 720 F.2d at 797-98; 748 F.2d at 232.

By contrast, there is no possibility of state relief for petitioner in this case. Both respondent and the court below concede that petitioner has no remedy under New Jersey law for the injuries which he sustained. Thus, the present case alone assures the Court and those who rely upon its decisions of the definitive answer to a pressing question which has four times caused the Court to grant review in cases it believed would present that question.

CONCLUSION

For all of these reasons, as well as the reasons set forth in his petition for certiorari, Robert Davidson respectfully requests the Court to grant his petition for a writ of certiorari.

James D. Crawford
Attorney for Petitioner

Julie A. Waddell
SCHNADER, HARRISON, SEGAL & LEWIS
Suite 3600, 1600 Market Street
Philadelphia, Pennsylvania 19103
(215) 751-2162

Of Counsel.

Dated: May 13, 1985

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FILED
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No. 84-6470

In the Supreme Court of the United States

OCTOBER TERM, 1985

ROBERT DAVIDSON, PETITIONER

v.

JOSEPH CANNON and ROBERT JAMES, RESPONDENTS

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE THIRD CIRCUIT

JOINT APPENDIX

JAMES D. CRAWFORD
Attorney for Petitioner
SCHNADER, HARRISON, SEGAL & LEWIS
Suite 3600
1600 Market Street
Philadelphia,
Pennsylvania 19103
(215) 751-2162
Of Counsel

IRWIN I. KIMMELMAN
Attorney General for New Jersey
Attorney for Respondents, Joseph Cannon and Robert James
RICHARD J. HUGHES
Justice Complex
CN 112
(609) 633-7089
JAMES J. CIANCIA
Assistant Attorney General
Of Counsel
MADELEINE WATERS MANSIER *
Deputy Attorney General
On the Brief
* Counsel of Record

PETITION FOR CERTIORARI FILED MARCH 27, 1985
CERTIORARI GRANTED JUNE 3, 1985

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

No. 81-253

ROBERT DAVIDSON, PLAINTIFF

v.

EDWARD O'LONE, SUPT., JOSEPH CANNON, ASST. SUPT., ARTHUR JONES, HEARING OFF., SGT. ROBERT JAMES, INTERNAL AFFAIRS, DEFENDANTS

RELEVANT DOCKET ENTRIES

1981	
January 27	Complaint filed.
March 27	Answer filed on behalf of all Defendants.
May 26	Pre-trial Order entered.
August 28	Notice of Motion by Defendants and for an Order granting Summary Judgment.
November 16	Opinion granting Summary Judgment in favor of Defendant O'Lone, but denying Summary Judgment in favor of Defendants Jones, Cannon and James, filed.
November 16	Order granting Summary Judgment in favor of Defendant O'Lone, but denying Summary Judgment in favor of Defendants, Jones, Cannon and James, filed.
1982	
October 13	Opinion granting Judgment in favor of Defendant Jones and against Plaintiff, and granting Judgment in favor of Plaintiff and against Defendants Cannon and James in the sum of $2,000.00, filed.
October 13	Order entering Judgment in favor of Defendant Jones and against Plaintiff, and in favor of Plaintiff and against

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Docket No. 82-5743

ROBERT DAVIDSON

vs.

EDWARD O'LONE, SUPT., JOSEPH CANNON, ASST. SUPT., ARTHUR JONES, HEARING OFF., SGT. ROBERT JAMES, INTERNAL AFFAIRS

JOSEPH CANNON and ROBERT JAMES, APPELLANTS

RELEVANT DOCKET ENTRIES

DATE	FILINGS—PROCEEDINGS
1983	
Jan. 11	Mot by aplts for stay of execution of, or any proceedings to enforce, D.C. Judgment entered in favor of plaintiff in sum of $2,000.00 on 10-13-82 pending appeal, filed.
Jan. 12	Submitted on above motion. Coram:
Jan. 13	Order (*Weis*, & Sloviter, C.J.) granting above motion, filed.
Jan. 13	CC of above order to C of D.C.
May 5	Mot by aplt pro se for appointment of cnsl, filed.
May 27	Submitted on above motion. Coram: Hunter and Higginbotham, C.J.s
June 30	Order (*Hunter* and Higginbotham, C.J.s) granting above motion, filed.
June 30	Order (Clerk) appt. James D. Crawford, Esq., as Ct. apptd. cnsl for appee, Davidson; apee's B due 30 days from order; aplt's RB due 14 days after appee's b filed and served, filed.

DATE	FILINGS—PROCEEDINGS
1983	
July 5	Letter dated 7/1/83 from Madeleine W. Mansier, Dep. Atty. General, advising that neither deft. O'Lone nor deft. Jones will participate in any way in the appeal filed on behalf of defts. Cannon and James, etc., recd. Send to Merits Panel.
July 21	Consent motion by appee. Robert Davidson to ext. briefing schedule so appee's B is due on 8/19/83, and applt's RB is due on 9/8/83, w/svc., filed.
July 25	Order (Clerk) granting above mot., w/NFX permitted, filed.
1984	
Mar. 22	Order (Seitz, Chief Judge and *Aldisert*, Adams, Gibbons, Hunter, Weis, Garth, Higginbotham, Sloviter and Becker, C.J.s) directing that the Clerk of this Court list the case for rehearing before the court in banc at the convenicence of the Court, filed.
Mar. 23	Six addition copies of the brief for the appellee received in response to a request from the Clerk's office
Mar. 23	Six additional copies of the brief for the appellant, reply brief and appendix received in response to a request from the Clerk's office
May 7	Reargued before Ct. en banc. Coram: Seitz, Ch.J., Aldisert, Gibbons, Hunter, Weis, Garth, Higginbotham, Sloviter, Becker, C.J.
July 17	Clerk's letter to crsl written at dir of Ct. requesting that each of them file letter memorandum discussing the impact of Supreme Ct's decision in Hudson v. Palmer, 52 U.S.L.W. 5051 (June 26, 1984), on issues in this case; memorandum should be an original & 10 ccs & filed with the Clerk of this Ct. on or before noon, July 24, 1984.

DATE	FILINGS—PROCEEDINGS
1984	
Jul 24	Letter memorandum discussing the impact of the Supreme Court's decision in *Hudson v. Palmer*, etc. rec'd fr. Madeleine W. Mansier, Esq., cnsl for Appellants which has been rec'd in accordance with the Ct's request.
Jul 24	Letter rec'd fr. James D. Crawford, Esq., cnsl for aplee addressing the question of the effect of the decision of the U. S. Supreme Court in *Hudson v. Palmer*, etc. rec'd in accordance with the Ct's request.

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

Civil No. 81-253

ROBERT DAVIDSON, PLAINTIFF

v.

EDWARD O'LONE, SUPT., JOSEPH CANNON, ASST. SUPT., ARTHUR JONES, HEARING OFF., SGT. ROBERT JAMES, INTERNAL AFFAIRS, DEFENDANTS

COMPLAINT

[Filed Jan. 27, 1981]

I. Previous Lawsuits

A. Have you begun other lawsuits in state or federal court dealing with the same facts involved in this action or otherwise relating to your imprisonment? Yes [ ] No [x]

B. If your answer to A is yes, describe the lawsuit in the space below. [If there is more than one lawsuit, describe the additional lawsuits on another piece of paper, using the same outline.]

1. Parties to this previous lawsuit
   Plaintiffs none
   Defendants none

2. Court [if federal court, name the district; if state court, name the county] none

3. Docket number none

4. Name of judge to whom case was assigned none

5. Disposition [for example: Was the case dismissed? Was it appealed? Is it still pending?] none

6. Approximate date of filing lawsuit none

7. Approximate date of disposition none

II. Place of Present Confinement Leesburg State Prison, Leesburg, New Jersey

A. Is there a prisoner grievance procedure in this institution? Yes [ ] No [x]

B. Did you present the facts relating to your complaint in the state prisoner grievance procedure? Yes [ ] No [x]

C. If your answer is YES,

1. What steps did you take? none

2. What was the result? none

D. If your answer is NO, explain why not See answer II(a)

E. If there is no prison grievance procedure in the institution, did you complain to prison authorthorities? Yes [x] No [ ]

F. If your answer is YES,

1. What steps did you take? Informed prison officials of pending harm that would result in physical violence from another inmate.

2. What was the result? No steps taken from this information, resulting in multiple stab wounds, broken nose, injured finger.

III. Parties

[In item A below, place your name in the first blank and place your present address in the second blank. Do the same for additional plaintiffs, if any.]

A. Name of Plaintiff Robert Davidson #61661

Address Leesburg State Prison
Leesburg, New Jersey 08327

[In item B below, place the full name of the defendant in the first blank, his official position in the second blank, and his place of employment in the third blank. Use item C for the names, positions, and places of employment of any additional defendants.]

B. Defendant Edward O'Lone is employed as Superintendent at Leesburg State Prison, at Leesburg, New Jersey

C. Additional Defendants Joseph Cannon, Asst. Superintendent, Arthur Jones, Disciplinary Hearing Officer, Sgt. Robert James, of Internal Affairs

IV. Statement of Claim

[State here as briefly as possible the *facts* of your case. Describe how each defendant is involved. Include also the names of other persons involved, dates and places. Do not give any legal arguments or cite any cases or statutes. If you intend to allege a number of related claims, number and set forth each claim in a separate paragraph. Use as much space as you need. Attach extra sheet if necessary.]

On Wensday December 17, 1980, inmates McMilliam and Gibbs were fighting this plaintiff interceded in stopping the fight. On same said date, this plaintiff received threats from inmate Mc-

Milliam. Disciplinary hearing was held for said fight on December 19, 1980 by defendant Jones, McMilliam received no disciplinary action. Defendant Jones were aware of McMilliam's threat against plaintiff. On December 21, 1980, McMilliam succeeded in carrying out his threat against plaintiff resulting in a broken nose, multiple stab wounds about plaintiff's head, face and possible broken finger. Defendant Jones informed Sgt. James of the impending danger of McMilliam's threats. Sgt. James informed this plaintiff that he would advise defendants Cannon and O'Lone of this information. Defendants were aware at all times of this danger, defendant's inaction resulted in physical injury to plaintiff violative of the 8th and 14th Amendments.

V. Relief

[*State briefly exactly what you want the court to do for you.* Make no legal arguments. Cite no cases or statutes.]

Plaintiff wants to recover $100,000.00 Decalatory damages because his injuries may have a lasting effect upon him. Punitive damages in the amount of $100,000.00 for the defendants failure to act in protecting plaintiff from physical injuries suffered at the hands of inmate McMilliam. And any other relief equitable and just that the Court deems just and appropriate.

Signed this 20th day of Jan., 1981

/s/ Robert Davidson
Signature of Plaintiff

I declare under penalty of perjury that the foregoing is true and correct.

Jan. 20, 1981 /s/ Robert Davidson
Signature of Plaintiff

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

Civil Action No. 81-253

Honorable Stanley S. Brotman

ROBERT DAVIDSON, PLAINTIFF

v.

EDWARD O'LONE, ETC., ET AL., DEFENDANTS

ANSWER

[Filed Mar. 27, 1981]

Defendants Edward O'Lone, Joseph Cannon, Arthur Jones and Robert James say by way of answer to the complaint.

AS TO JURISDICTION

1. Defendants admit that this Court has jurisdiction over the complaint pursuant to 28 U.S.C. § 1343(3).

AS TO PARTIES

2. Defendants admit that the plaintiff, Robert Davidson, is an inmate at the Leesburg State Prison.

3. Defendants admit that defendant Edward O'Lone is the Superintendent of the Leesburg State Prison, that defendant Joseph Cannon is the Assistant Superintendent, that defendant Arthur Jones is a disciplinary hearing officer for the New Jersey Department of Corrections, and that Robert James is a corrections officer at the Leesburg State Prison with rank of Sergeant.

AS TO FACTS

4. It is admitted that the plaintiff was involved in an altercation involving himself and two other inmates, Albert Gibbs and Davidson McMillian on December 17, 1980, but defendant's are without knowledge or information as to McMillian's threatening plaintiff.

5. It is admitted that plaintiff and the other two inmates involved in the fight were given disciplinary charges and appeared before defendant Arthur Jones for a hearing on December 19, 1980. It is denied that defendant Jones knew about the threat made by McMillian until after the conclusion of the hearings, when plaintiff submitted a handwritten note suggesting that McMillian had threatened him.

6. It is admitted that plaintiff's note was referred to defendant Jones, but denied that he became aware of the threat until after the attack had occurred. It is also denied that defendant O'Lone had knowledge of the threat.

7. It is admitted that plaintiff was assaulted by McMillian on December 21, 1980.

FIRST AFFIRMATIVE DEFENSE

Plaintiff failed to follow normal procedures in reporting the threat, and therefore is responsible in part for the attack.

SECOND AFFIRMATIVE DEFENSE

Defendant's acted at all times in good faith and within the scope of their official duties, and therefore are immune from damages.

WHEREFORE defendants demand judgment dismissing the complaint.

JUDITH A. YASKIN
Acting Attorney General
of New Jersey

OPINION GRANTING SUMMARY JUDGMENT

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

November 16, 1981

Mr. Robert Davidson, # 61661
Leesburg State Prison
Leesburg, New Jersey 08327

Lyle P. Hough, Jr., Esquire
Deputy Attorney General
Department of Law & Public Safety
State House Annex
CN112
Trenton, NJ 08625

Re: Robert Davidson v. Edward O'Lone, et al.
Civil Action No. 81-253—LETTER OPINION

Dear Litigants:

This is a civil rights action under 42 U.S.C. § 1983 brought by a prisoner appearing *pro se* against the warden and several supervisory and staff personnel at the Leesburg State Prison. Plaintiff alleges violations of his constitutional rights arising out of defendants' deliberate and/or negligent failure to protect him from assault by another inmate. Defendants now move for summary judgment in their favor pursuant to Fed. R. Civ. P. 56.

The facts of this case appear to be as follows. On December 17, 1980, plaintiff Davidson and two other inmates were held in detention as a result of an altercation. One of the other inmates, McMilliam, thereafter threatened to assault plaintiff. The three were charged with a disciplinary infraction and a hearing on the violations

was held Friday, December 19, 1980, by defendant Arthur Jones, a disciplinary hearing officer. Plaintiff and McMilliam were found not guilty and released from lockup. Plaintiff informed an Officer Garcia of the threat by McMilliam, both orally and in a written note on Friday morning. He apparently did not take any other steps to secure protection, such as informing his center supervisor or requesting protective custody. The information was communicated to defendant Jones after the disciplinary hearing. The note was then taken to defendant Joseph Cannon, Assistant Superintendent, who directed that it be given to defendant Robert James of the Internal Affairs Unit. The note was left on defendant James' desk. By this time, several hours had elapsed since plaintiff first reported the threat to Garcia. Because defendant James was busy with other duties, the note remained unattended to until after the weekend. On Sunday, December 21, 1981, McMilliam did assault and seriously injure plaintiff.

On our analysis of the relevant legal standards, we cannot conclude that all of the defendants are entitled to judgment as a matter of law. Only defendant O'Lone, superintendent of the prison, is entitled to summary judgment. As to the rest of the defendants, the motion will be denied.

We will first address the motion with respect to defendant O'Lone. It is well-settled in this Circuit that § 1983 liability cannot be based on a respondeat superior theory, but instead requires actual participation in the unlawful conduct, or actual knowledge and acquiescence in that conduct. *Scott v. Plante*, 641 F.2d 117, 127 (3rd Cir. 1981). Defendant O'Lone is not alleged to have participated in or known about the chain of events of which defendant complains. This fact being undisputed, he is entitled to judgment as a matter of law. The motion will be granted in the case of defendant O'Lone.

As for the remaining defendants, plaintiff has alleged that each played a role in the events of December 19,

1980, which form the basis of this complaint. We must therefore examine whether these defendants are entitled to judgment at this early point in the proceedings.

Defendants' argument is that plaintiff cannot prove deliberate indifference on the part of Jones, Cannon and James, and that mere negligence, if proven, is not enough to entitle plaintiff to relief. They argue that defendants Jones and Cannon acted reasonably under the circumstances to secure plaintiff's protection by passing on the information, and that defendant James was, at worst, negligent in failing to read the note on Friday. Defendants assert that, there being no showing of deliberate failure to act, plaintiff cannot prevail because, first, negligence does not state a cause of action under § 1983, and second, the negligent acts alleged to not rise to the level of "cruel and unusual punishment" proscribed by the Eighth Amendment.

In support of their motion, defendants submit affidavits regarding their actions on the day in question, none of which includes any suggestion of deliberate indifference to plaintiff's needs. Although plaintiff has not submitted contrary proofs at this time, we treat plaintiff with some latitude given the fact that he is a prisoner bringing this action *pro se*. *Haines v. Kerner*, 404 U.S. 519 (1972); *Roseboro v. Garrison*, 528 F.2d 309 (4th Cir. 1975). We do not feel that we can grant summary judgment on the basis of defendants' affidavits. A motion for summary judgment is not a trial on paper. It is not designed to provide an easy method for the resolution of factual issues. *Mortensen v. First Fed. Sav. & Loan Ass'n*, 549 F.2d 894, 891 (3rd Cir. 1977). Plaintiff has disputed the motives of defendants and he should be given the opportunity at trial to contest the facts the defendants assert in their affidavits. *See United States ex rel. Jones v. Rundle*, 453 F.2d 147 (3rd Cir. 1971). Even if we were to accept as true the affidavits of defendants, the issue of negligence remains, as will be discussed below. Negligence is rarely appropriate for

summary judgment because it turns on judgments of reasonableness under all the circumstances, which can only be made upon a full record. *Mayle v. City of New Castle*, 71 F.R.D. 674, 676 (W.D. Pa. 1976); 10 Wright & Miller, Federal Practice and Procedure § 2729, 570-72 (1973).

Defendants argue incorrectly that a negligent violation of constitutional rights is not actionable under § 1983. In *Parratt v. Taylor*, —— U.S. ——, 101 S.Ct. 1908 (1981), the Supreme Court indicated that it is. In that case, plaintiff asserted that prison officials negligently lost his property in violation of his due process rights. The Court noted that two prior decisions which left the question of negligence and § 1983 liability unresolved (*Procunier v. Navarette*, 434 U.S. 555 (1978), and *Baker v. McCollan*, 443 U.S. 137 (1979)) has not provided sufficient guidance to the lower courts. The Court stated, "Nothing in the language of § 1983 or its legislative history limits the statute solely to intentional deprivations of constitutional rights." *Parratt v. Taylor*, *supra* at 1912. Section 1983 provides a civil remedy "for deprivations of federally protected rights caused by persons acting under color of state law without any express requirement of a particular state of mind." *Id.* Because a wrong was negligent rather than intentional does not foreclose recourse under § 1983. *Id.*, citing *Baker v. McCollan*, *supra*. The Court went on to consider the merits of the due process claim. We must likewise address the matter on the merits and examine whether the conduct alleged, if taken as true, deprived plaintiff of rights, privileges, or immunities secured by the Constitution.

Plaintiff's complaint is framed as an Eighth Amendment claim. We feel that it is also fairly read to state a claim of deprivation of liberty without due process, in violation of the Fourteenth Amendment. *See Haines v. Kerner*, 404 U.S. 519 (1972). We will consider each of these theories in turn.

I. *Cruel and Unusual Punishment*

The Eighth Amendment proscribes "cruel and unusual punishment. The Supreme Court's most recent treatment of the Eighth Amendment rights of prisoners is *Rhodes v. Chapman*, —— U.S. ——, 101 S.Ct. 2392 (1981) Its formulation of the Amendment is that it prohibits punishments which involve "unnecessary and wanton infliction of pain [which is] totally without penological justification." *Id.* at 2398, citing *Gregg v. Georgia*, 428 U.S. 153, 183 (1976) and *Estelle v. Gamble*, 429 U.S. 97, 103 (1976).

The Supreme Court has not addressed whether assault by inmates itself constitutes cruel and unusual punishment. This question has been considered by a number of lower courts. In this Circuit, the case of *Hampton v. Holmesburg Prison Officials*, 546 F.2d 1077 (3rd Cir. 1976) dealt with the matter. That case involved a pretrial detainee who was assaulted by inmates. He alleged that defendant guards failed to protect him from attack and thereafter denied him medical care for six days. In the case at bar, there is no allegation that the plaintiff did not receive prompt medical attention following the assault. Even in the more aggravated fact situation of *Hampton*, the court of appeals held that the action should have been dismissed. The court focused on the denial of medical care. To establish an Eighth Amendment violation, the court stated, prison officials' indifference to the inmates needs must be deliberate and the actions intentional. *Id.* at 1081. "Neglect [or] carelessness is more properly the subject of a tort action in the state courts." *Id.*

More on point is *United States ex rel. Miller v. Twomey*, 479 F.2d 701 (7th Cir. 1973), *cert. denied*, 414 U.S. 1146 (1976), where the Seventh Circuit held that the alleged negligence of prison guards in supervision of an area where an inmate assault occurred did not inflict cruel and unusual punishment, but rather stated a common law

tort only. *See also Holmes v. Goldin*, 615 F.2d 83 (2nd Cir. 1980) (requiring showing of "purposeful or deliberate indifference to plaintiff's safety"). Each of these cases make intentionality an essential element of an Eighth Amendment claim. This is consistent with the wording of the Amendment, which refers to "punishment," implying some measure of intention.

Still other decisions draw a distinction between isolated attacks and repeated attacks. The Fourth Circuit has stated that while an occasional, isolated attack by one prisoner against another may not constitute cruel and unusual punishment, confinement in prison where "violence and terror reign" is actionable. *Woodhous v. Virginia*, 487 F.2d 889, 890 (4th Cir. 1973). The Seventh Circuit upheld a prisoner's complaint under the Eighth Amendment where he allegedly suffered repeated acts and threats of physical violence and sexual assault by other inmates. *Little v. Walker*, 552 F.2d 193 (7th Cir. 1977). *See also Spence v. Staras*, 507 F.2d 554 (7th Cir. 1974).

Considering these legal standards, it is our conclusion that plaintiff cannot sustain the action against the remaining defendants on an Eighth Amendment theory. The defendants' position that the plaintiff must prove deliberate indifference in order to make out an Eighth Amendment violation is correct. Although their affidavits indicate that this proof may not be forthcoming, we have already stated that this alone is not reason to find in defendants' favor at this point. Nonetheless the plaintiff's claim of cruel and unusual punishment must fail for the further reason that his complaint seeks recovery under the Eighth Amendment for a single attack. While every such assault and injury is a very serious matter, an isolated attack cannot be said to amount to cruel and unusual punishment. For this reason, we do not believe that plaintiff can proceed on an Eighth Amendment theory.

II. *Due Process*

The second theory is that the facts recited in the complaint allege a deprivation of liberty without due process, in violation of the Fourteenth Amendment. In *Curtis v. Everett*, 489 F.2d 516 (3rd Cir. 1973) *cert denied*, 416 U.S. 995 (1974), the court of appeals concluded that prisoner's allegation that prison officials failed to protect him from the attacks of another inmate stated a cause of action under the due process clause. This holding must be said to have been modified by the Supreme Court's view in *Parratt v. Taylor*, *supra*, that a post-deprivation remedy through a tort claim in state court is sufficient process in cases of unintentional deprivations of property or liberty. *See Parratt* at 1915-17; see also *Ingraham v. Wright*, 430 U.S. 651 (1977). In *Parratt*, the State of Nebraska provided the prisoner with a remedy through a tort claims procedure, which could have fully compensated him for the loss suffered at the hand of the State. Neb. Rev. Stat. § 81-8, 209 *et seq.* *Parratt* at 1916. In *Ingraham*, the Court found that the State of Florida provided to schoolchildren who were deprived of liberty adequate post-deprivation relief in the form of its common law tort remedies. *Ingraham v. Wright*, *supra* at 682.

In the instant case, it appears that the prisoner has no adequate post-deprivation relief. The New Jersey Tort Claims Act, N.J.S.A. 59:1-1, does not provide a remedy similar to that of Nebraska's in *Parratt*. The New Jersey Act contains a sweeping provision that neither a public entity *nor a public employee* shall be liable for injury caused by a prisoner to any other prisoner. N.J.S.A. 59:5-2. Under the common law of New Jersey prior to passage of the Act, a prisoner was entitled to recover from individual officials upon a showing that they negligently failed to discharge their responsibility for his care with resulting injuries to him. *See Harris v. State*, 61 N.J. 585, 590 (1972) But the Tort Claims Act has im-

munized these employees, as well as the state, so that plaintiff has no remedy whatsoever under state law.

Given the absence of any process for remedying the allegedly negligent deprivation of plaintiff's liberty by defendants, the complaint states a cause of action under § 1983 for violation of plaintiff's due process rights. Defendants have not sustained their burden of showing that they are entitled to judgment as a matter of law. Their motion for summary judgment is accordingly denied.

Very truly yours,

/s/ Stanley S. Brotman
STANLEY S. BROTMAN

SSB:mhg

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY
CAMDEN, NEW JERSEY, 08101

Docket No. 81-253

ROBERT DAVIDSON, PLAINTIFF

v.

EDWARD O'LONE, ET AL., DEFENDANTS

TRIAL: VOLUME ONE OF ONE

Before: THE HONORABLE STANLEY S. BROTMAN, JUDGE, UNITED STATES DISTRICT COURT, DISTRICT OF NEW JERSEY, CAMDEN, NEW JERSEY.

Date: May 7, 1982.

Time: 9:30 A.M.

APPEARANCES:

ROBERT DAVIDSON, pro se.
242 Undercliff Avenue,
Edgewater, New Jersey, 07020

IRWIN I. KIMMELMAN, Attorney General of New Jersey,
By: LYLE P. HOUGH, JR., Deputy Attorney General
RICHARD J. HUGHES, Justice Complex, Trenton, New Jersey, 08625,
Attorney for Defendants.

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[3] THE COURT: I'm sorry that it's warm in here but there's nothing that we can do. Something is wrong with the unit.

This is the matter of Davidson versus O'Lone.

MR. DAVIDSON: Yes, your Honor.

THE COURT: You're representing yourself.

MR. DAVIDSON: I am.

THE COURT: All right. Do you want to give me a brief opening statement

MR. DAVIDSON: Before I proceed, your Honor, there is, there are several witnesses that are not here yet.

THE COURT: Have they been subpoenaed?

MR. DAVIDSON: Yes.

THE COURT: We start at 1:30. It's ten minutes to two.

MR. DAVIDSON: One of them is an officer from the Institution. I have no control over that.

THE COURT: He's been subpoenaed to appear?

MR. DAVIDSON: Yes, he was. All the other witnesses are here.

[4] THE COURT: We will proceed. If he doesn't arrive and he's been served with a subpoena we will handle it. Would you please give me a brief opening.

MR. DAVIDSON: All right. On December 17th there was a fight between two inmates.

THE COURT: What year is this, sir?

MR. DAVIDSON: 1980. I interceded in breaking up the fight.

THE COURT: Where was this fight?

MR. DAVIDSON: In the unit of Leesburg State Prison, D-Unit. When the officers came up and broke up the fight, the inmate McMillian, inmate Gibbs and myself all got locked up. That was on December 17th. On the 19th of December we went to, all three of us went to Court-Line and the matter was disposed of through the Court-Line procedure that is instituted at the prison. Inmate McMillian was found not guilty, no cause for action. I was found not guilty, no cause for

action and Mr. Gibbs was found guilty of fighting and got ten days lock-up status. Prior to that all three of us were in lock-up status pending the Court-Line [5] procedure.

When I came back from Court-Line McMillian was already back at the unit on the front steps and when I walked past him he made verbal threats to me. I continued down to Mr. Gibbs' cell and was talking with him and I told him what had happened and after making a, after discussions with him, I decided that I should go back and tell the Court-Line officer what had happened, and, that if there was any more trouble between McMillian and myself, that they should be forewarned or they should know about it. So I went back and I spoke with Officer Garcia, who is the Court-Line officer, recording officer. I explained what the situation was and he told me put it in writing. He gave me his pen and I got a piece of paper from the desk officer outside and I wrote out what had happened. He said okay, go on back to your unit. I went back to the unit.

At this point he showed the note to Mr. Jones, who is the Hearing Officer, a civilian man. He gave it back to Mr. Garcia, who was told to give it to Mr. Cannon, the [6] assistant superintendent. The note was taken to Mr. Cannon's office and Mr. Cannon said let Sergeant James handle it from Internal Affairs. Mr. Garcia took the note in to Sergeant James and at this point it becomes a little sketchy because Mr. James said that he never read the note that was delivered to him by Mr. Garcia, even though it was directly sent from the superintendent. But see Mr. James has no knowledge of any of the proceedings or what happened until after the fact.

THE COURT: What did James do with it?

MR. DAVIDSON: He didn't do anything with it. According to the papers submitted it laid on his desk over the weekend and there was nothing done about it by Mr. James. But, at the same time Mr. James said

that he was called away on another matter with a Mr. Hamlin in another unit who had gotten rowdy or that there was a knife in Norman Crowder's cell in B-Unit. In this way I believe he was trying to take any of the responsibility off his shoulders. But, at the same time, your Honor, Mr. James could have just picked up the telephone, called up the [7] unit and had the officer in the units secure the cell door that was in question regarding a weapon. There was no need for him personally to appear there once that door is locked. Anything that is in that room is not going to come out.

THE COURT: In respect to going to B-Unit?

MR. DAVIDSON: Yes, sir.

THE COURT: Let's get back to the point he didn't read it. It was on his desk over the weekend, is that correct?

MR. DAVIDSON: Yes.

Now, upon further investigation into this matter it turns out that four days prior to the incident an Officer Gibson, who was the officer in C-Unit received word from one of his private sources of information that there was going to be a problem between Davidson and McMillian and Gibbs. He put it in writing to the proper authorities, I believe to Captain Muggelsworth. Nothing was done about it at that point either, at that level, in which case, I feel that there was total neglect on that four days prior and then when [8] I gave them the note that they had two days notice of a problem that was pending. That was a very volitile situation because this particular inmate, McMillian, has an extensive record of, of physical assault and fights and everything right down through his whole institutional history. It wasn't just that institution I am speaking of.

I feel at this point, your Honor, that there was an intentional neglect on the part of all the people involved, all the authorities involved.

Now I think that you will find that the defendants will say that I should have put myself into protective

custody to prevent this kind of a problem. I submit, your Honor, that had the authorities confronted McMillian just verbally and either threaten him or told him we don't want any more problems or if there was some knowledge or such action taken, there would not have been any kind of confrontation between McMillian and myself.

THE COURT: Tell me what happened as a result of that confrontation. Tell me what happened.

[9] MR. DAVIDSON: Sunday morning I believe it was the 21st of December, 1980, I had gone to work and when I got back from work I went down to Gibbs' cell. He was still doing his lock-up time. I was talking to him through the door and above me was McMillian on the tier above me yelling down all kinds of profanities and threats that I tried to disregard. The officer that was on duty in the unit at that time had made his rounds on the upper tiers first and then proceeded to make his rounds on the lower tier. After he made the rounds on the lower tier McMillian came down the steps right behind the officer and as the officer was walking, so was McMillian. I am talking to inmate Gibbs through the door and McMillian comes up to me with, sticking the finger in the face and verbal threats and all kinds of abusive language and out of nowhere he punches me in the nose with his left hand and proceeds to stab me about the face, the head, the neck and all over my body with a fork. After we were wrestling and we got down on the floor and he proceded to, still stabbing me, some [10] of the other inmates came and said the "man" is coming and proceeded to break up the fight. I was going. I was taken over to the infirmary and from the infirmary I was taken out to Newcomb Hospital in Vineland for X-rays of my head.

THE COURT: What injuries did you sustain?

MR. DAVIDSON: I had got a broken nose and many stab wounds from the fork and that was primarily the main extent of it.

All they did was, they went to McMillian's room and found the fork and bloody clothes and stuff like that in his room and the fact that I gave them the note prior to the incident would be to my thinking indicative of the fact that I was looking for some kind of protection as you might put it. It didn't mean protection in the sense of being locked up in my room. I don't feel that I did anything wrong to be locked up for protective custody. I just feel that something should have been done on the part of the authorities to prevent it from getting to the point that it did.

THE COURT: As a result of what [11] happened what are you claiming are your damages? What are you seeking from this Court?

MR. DAVIDSON: I was looking for compensatory damages, your Honor.

THE COURT: What are you looking for?

MR. DAVIDSON: Do you mean in dollars?

THE COURT: What is your claim?

MR. DAVIDSON: Now that's a very sensitive subject, your Honor.

THE COURT: You are here you have to tell me.

MR. DAVIDSON: No—I understand that but I don't know if you could hear but my voice is not like it ever was. My nose was fixed at St. Francis Hospital. Since then I have got a postnasal problem. I don't know what the heck it is. I can't talk in a normal or what used to be a normal voice any more. But I just felt that something, some amount should be settled at and I think I would leave that in the hands of you, your Honor.

THE COURT: Well, do you have any expert testimony, any expert medical testimony to testify to the conditions that you presently [12] have was causally-related to what happened at the prison?

MR. DAVIDSON: I just came home from the Institution. I am home about five weeks. I don't have funds to get any expert testimony or anybody else down to testify in my behalf. The doctor that operated on me is in Trenton.

THE COURT: Was that done while in prison?

MR. DAVIDSON: Yes, I believe it was just after you declared the defendant's claim for dismissal.

THE COURT: I denied it.

MR. DAVIDSON: You denied it, yes. It was right after that that they decided—

THE COURT: This is 1980?

MR. DAVIDSON: 1980.

THE COURT: Let me hear from the defendant. You may be seated, sir.

MR. HOUGH: Your Honor, this case involves an allegation judging from the letter Opinion that you wrote in late '81 denying the Motion for Summary Judgment with respect to the Fourteenth Amendment due process claim, the case presents issues of whether or not any [13] of the defendants were negligent in not protecting Mr. Davidson from this attack.

The evidence will establish that as the plaintiff related earlier there was a note written and the note was delivered to the assistant superintendent who is a defendant, Mr. Cannon. Mr. Cannon directed that the note go to the defendant, Sergenat Robert James, who is in the Internal Affairs. The note was delivered at approximately 2:15 p.m. on a Friday afternoon. There was no showing that of any urgency by the deliverer of the note. Sergeant James was in his office for approximately 15 minutes after that and then left the office to search another inmate's cell. The evidence will establish he was involved in what could have been and also ended up with lawsuits for the rest of the day. He never got back to his office and he did not work the following Friday, Saturday or Sunday.

Mr. Davidson said the incident occurred on that Sunday morning the 21st of 1980 and his, the evidence will show that the defendants acted reasonably and that there was no negligence in this case, much less reckless [14] indifference.

THE COURT: Now so that we can move this along quickly, apparently as I gather from what you said and my remarks are directed to the Deputy Attorney General, there's really no i-sue on the facts, is there? You have, your version of the facts up to and including the passage of the note to Sergeant Jones?

MR. DAVIDSON: James.

THE COURT: James, rather. Yours is the same as that of the plaintiff?

MR. HOUGH: Very similar, yes.

THE COURT: Well is it, do you, can you stipulate those facts, can you stipulate the facts that and let me read to you this paragraph and see if it can be stipulated to. Can we stipulate to the following: On December 17, 1980, plaintiff Davidson and two other inmates were held in detention as a result of an altercation?

MR. HOUGH: True.

THE COURT: You stipulate?

MR. DAVIDSON: Yes.

THE COURT: One of the other inmates, McMillian, thereafter threatened to assault [15] the plaintiff. Can you stipulate so that?

MR. HOUGH: Yes, Judge.

MR. DAVIDSON: Yes, your Honor.

THE COURT: There were hearings, disciplinary hearings on the violations that were held Friday, December 19, 1980, by defendant Arthur Jones, a disciplinary Hearing Officer. Can you stipulate to that?

MR. DAVIDSON: Yes.

MR. HOUGH: Yes, your Honor.

THE COURT: The plaintiff and McMillian were found not guilty and released from lock-up. Can you stipulate to that?

MR. DAVIDSON: Yes.

MR. HOUGH: Yes.

THE COURT: Plaintiff informed Officer Garcia about, of the threat by McMillian in both oral and in written form. That's on Friday morning.

MR. DAVIDSON: Yes.

THE COURT: Can you stipulate to that?

MR. HOUGH: Yes, Judge.

THE COURT: Plaintiff did not take any other steps to seek your protection such as requesting protective custody. Can we [16] stipulate to that?

MR. DAVIDSON: Yes, your Honor.

MR. HOUGH: Yes, Judge.

THE COURT: The information, the note was then taken to, by Garcia to defendant Joseph Cannon, assistant superintendent. Can you stipulate to that?

MR. DAVIDSON: Yes.

MR. HOUGH: Yes, your Honor.

THE COURT: And assistant superintendent Joseph Cannon gave a directive to defendant Robert James of the Internal Affairs Unit. Can you stipulate to that?

MR. HOUGH. Yes, Judge.

MR. DAVIDSON. Yes.

THE COURT: The note was left on defendant James' desk. May we stipulate to that?

MR. DAVIDSON: Yes, your Honor.

MR. HOUGH: Yes, Judge.

THE COURT: Now, I guess that is the most that we can stipulate to or can you stipulate to anything else? Can anything else be stipulated to?

May we stipulate on Sunday, [17] December 21, 1981, McMillian did assault and injure the plaintiff?

MR. HOUGH: 1980.

THE COURT: I'm sorry, 1980. I'm sorry. Can you stipulate to that?

MR. DAVIDSON: Yes, your Honor.

MR. HOUGH. Yes.

THE COURT: All right. Do you want to call your witnesses? Is it up to you to call your witnesses. Did you subpoena other people?

MR. DAVIDSON: Yes.

THE COURT: Call your witnesses to the witness stand and we will take their testimony.

MR. DAVIDSON: It would deal with who I have right now.

THE COURT: Correct.

MR. DAVIDSON: I would like to speak with Mr. Jones, the Hearing Officer.

THE COURT: Mr. Jones, do you want to take the stand, please.

MR. JONES: I am the Hearing Officer with the Department of Corrections.

ARTHUR JONES, having been duly sworn, was examined and testified as follows:

[18] DIRECT EXAMINATION BY MR. DAVIDSON:

Q. Mr. Jones, do you recall the incident that we are discussing here?

A. Yes, I do.

Q. With Mr. McMillian, myself and Mr. Gibbs?

A. Yes.

Q. Do you recall Mr. Garcia giving you this note in question on the morning of Court-Line, just after you had seen me as a defendant at that point for the hearing purposes?

A. I do.

Q. What did you tell Mr. Garcia when he gave you the note that I was told to write out?

A. Okay. If I reiterate correctly I told Mr. Garcia, since I was not a part of the Institution, that I was assigned to the Commissioner's Office, I had no official capacity to act on that note, that they should take the note and pass it on to the proper authorities at the prison.

Q. When inmate McMillian was brought to you, brought before you for his hearing on this confrontation that he had, after the hearing was had, over with, did the representative that represented Mr. McMillian speak with you regarding the matter?

A. I cannot remember.

[19] Q. Allan Jones—

A. It still doesn't ring a bell.

Q. I see. Would it refresh your recollection, would it bring back any recollection if I were to reiterate to you what was discussed between you and him? Would that help?

A. I don't know. You would have to reiterate that and then I could only tell you then.

Q. Didn't you say to him that he is a mean cookie—or didn't Mr. Jones say to you—just one second. Did Mr. Jones, the inmate, the inmate Jones say to you that he felt that there should be a separation of the inmates involved for the purpose of deterring any future retaliation by any of the parties involved?

A. I cannot remember any such conversation.

Q. You don't remember?

THE COURT: What are you reading from?

MR. DAVIDSON: I have a statement from Mr. Jones.

THE COURT: Have that marked as Plaintiff's Exhibit P-1. Mark it P-1. That is the statement from this witness?

MR. DAVIDSON: No. This is the inmate representative that represented McMillian.

THE COURT: It is not a statement of [20] this witness?

MR. DAVIDSON: No. I was just reiterating the facts that were discussed.

THE COURT: Okay.

MR. DAVIDSON: Do you want to leave this as evidence?

THE COURT: I don't know. I just want to identify what you are reading from.

MR. DAVIDSON: It is a notarized statement from Mr. Jones.

THE COURT: It will be marked as P-1 for identification only.

(At which time the aforementioned exhibit was marked P-1 for identification.)

Q. In other words you don't remember that as far as conversations that took place with Mr.—inmate Jones?

A. No.

Q. Then I won't dwell on it any further.

In other words now, as far as you're concerned, once you gave the note back to Mr. Garcia the responsibility was no longer in your hands?

A. Right.

MR. DAVIDSON: That's all, your Honor.

THE COURT: You may cross-examine.

[21] CROSS-EXAMINATION BY MR. HOUGH:

Q. Mr. Jones, you're employed as a disciplinary Hearing Officer, is that correct?

A. Yes, I am.

Q. Where do you work?

A. Well, I work at various institutions at any given time. I'm assigned specifically to the Commissioner's Office and go around to different prisons as I am assigned.

Q. What other prisons have you worked at besides Leesburg?

A. I have worked at Leesburg, Trenton and Varoom Building, Yardville, Jamesburg and Bordentown.

Q. Now, how long have you—are you assigned to each of the institutions?

A. I believe I was assigned to Leesburg, if I'm not incorrect, three years, approximately three years and I have been assigned to Trenton for about four months now and I have invariably worked at the other institutions as cases come up that were either, that they needed someone to handle it because a Hearing Officer was needed or as a replacement or was out sick or you know, something of that nature or on a day-to-day basis. Not in any particular given time at the other institutions, though.

[22] Q. I have premarked the exhibit, Judge, D-5.

THE COURT: Yes.

Q. Mr. Jones, do you recognize this?

A. I can't say that I recognize this particular piece of paper, sir. I do remember vaguely a note of this content but can't say specifically this is the same note.

THE COURT: Show it to the plaintiff so he can see what it is.

MR. DAVIDSON: I believe I have a copy of it. Right. I have that.

MR. HOUGH: Would you stipulate this is the note that you gave to Officer Garcia?

MR. DAVIDSON: Yes, it is.

THE COURT: D-5.

MR. HOUGH: I move it in evidence.

THE COURT: You can't do it until your side of the case. If the plaintiff has no objection—do you have any objection to it going into evidence?

MR. DAVIDSON: No.

THE COURT: All right. D-5 is now in evidence.

(At which time the aforementioned exhibit was marked in evidence.)

[23] THE COURT: May I see it, please?

MR. HOUGH: Yes, your Honor.

Q. Now Mr. Jones, how long have you been a Hearing Officer?

A. About four years now.

Q. Are you, do you hear many threats by prisoners, hear about threats by prisoners to attack others?

A. Yes.

Q. How often?

A. I would say at least five, six times a day. During the course of my proceedings I hear of inmates threatening one another.

Q. These are in hearings you're involved in, is that correct?

A. Yes, sir.

Q. Will you characterize this as a serious threat or a nonserious threat in light of your experience with the hearing about other threats?

THE COURT: How could he really answer that question. It's not a question in this man's background. Does he know the man's background at all? I have to step in because the plaintiff doesn't know. He does not have counsel. Certainly we have to deal with this [24] individual, his own background, people who are guarding him to have knowledge of his own particular situation. We have to get down to a subject of the situation and not to other people. Let me ask this question of the witness. Do you know anything about the background of this individual or his problems within the prison?

THE WITNESS: McMillian—I know about his background but not too much about inmate Davidson.

THE COURT: What do you know about McMillian's background?

THE WITNESS: McMillian has been before me previously on assault charges and fighting charges.

THE COURT: Then, if you were to receive a notice or someone tell you McMillian threatened someone, what conclusion would you reach?

THE WITNESS: That there was some validity to the threat.

THE COURT: Okay. You may proceed.

BY MR. HOUGH:

Q. Mr. Jones, did you have any authority to take [25] action to protect Mr. Davidson after becoming aware of this threat?

A Absolutely none. As I stated before I am employed by the Department of Corrections and I am not a part of the Institution per se and not involve myself in any aspects of the prison insofar as making decisions. This is why I referred to the note to the proper authorities at the prison.

Q. Did you at any time on the day in question, the 19th of December, 1980, act with any malice towards Mr. Davidson in the response you took to the note?

A. No, I did not. I think the records will reflect that inasmuch as he was found not guilty of the case he was involved in there—

Q. I am asking you about the, after the note was brought to your attention by Officer Garcia, did you act with malice when you did not take any action other than referring it to Corrections' personnel?

A. No, I did not.

Q. Did you have any belief that you were violating Mr. Davidson's Constitutional Rights when you referred to—

A. None whatsoever.

MR. HOUGH: That's all I have.

THE COURT: Mr. Davidson, do you have [26] any further questions you want to ask the witness?

MR. DAVIDSON: No, your Honor. I think it's enough.

THE COURT: Thank you sir.

Call your next witness, Mr. Davidson.

MR. DAVIDSON: I'd like to see Officer Garcia, please.

THE COURT: Officer Garcia, will you please come up here and be sworn.

JOSE GARCIA, having been duly sworn, was examined and testified as follows:

DIRECT EXAMINATION BY MR. DAVIDSON:

Q. Mr. Garcia, you have heard the facts that have been presented so far?

A. Yes.

Q. Do you agree with everything said up to this point?

A. Yes, sir.

Q. This note that the defendant presented that I gave to you the morning of the Court-Line proceeding, about what time was that?

A. About 9:30 and 10:00 in the morning.

Q. Right. And, for some reason which I just can't understand, from 9:30 or ten o'clock in the [27] morning until two o'clock or 2:30, as the defendants say, this note was floating around the Institution and nobody

knows who had it or why nothing was done. Maybe you can clarify that for us.

A. Yeah. We were conducting hearings.

Q. Pardon me?

A. We were conducting hearings.

Q. Yes?

A. We finished the last hearing about 11:30 and after we finished I went to Mr. Cannon's office. It was maybe around 20 minutes to twelve, and presented the note to Mr. Cannon. He told me after he looked at it, I can't recall if he looked at it or not, he told me to take it to Mr. James' office. So I stopped by Mr. James' office and he wasn't there. So I proceeded for my lunch period.

Q. Excuse me, sir. Before you go any further, what did you do with the note when you went to lunch?

A. I kept it with me.

Q. You kept it with you?

A. That's right. When I came back from lunch I checked with Mr. James' office. He wasn't there. I went back to my office to start doing my paperwork and I kept checking via the phone to see if Mr. James was there.

[28] Q. In his office?

A. He was still not there. The last time I'd say about two o'clock and between 2:00 and 2:15 Mr. James was in his office and I presented him with the note.

Q. Did he read the note?

A. I can't recall. No.

Q. When you went to his office after you finished conducting the hearings, Mr. Garcia, and, he was not available in his office—

A. He wasn't there, no.

Q. Right. Okay. Does that mean he is not available in the Institution or he just was not available because he was not in the office?

A. I don't know. I can't answer that. I can't keep track of him.

Q. But did you go any further? Did you go to the Center and ask the Center to page Mr. James?

A. No.

THE COURT: I would like to ask you a hypothetical question. Had you not seen Mr. James on Friday at all—

THE WITNESS: I saw him about two o'clock.

THE COURT: The question is if you had [29] not seen him—

THE WITNESS: I saw him.

THE COURT: Suppose you did not see him, what would you have done?

THE WITNESS: Well, I might take the note to the Center, whatever.

BY MR. DAVIDSON:

Q. I see. You wouldn't have taken the note with you over the weekend?

A. Who knows, I might.

Q. I was just asking because I don't know what the procedure is and I was looking to establish some kind of chain of communications here.

A. You see, talking about procedures, in this matter, I don't know because I'm just a Corrections Officer.

Q. Yes. So from the time you got the note from me at 9:30, ten o'clock in the morning, until two o'clock in the afternoon, you didn't know if Mr. James got around to reading the note, even though the note was sent to him from the assistant superintendent of the Institution. I can't for the life of me, I can't understand how the sergeant from Internal Affairs gets a note sent to him from the assistant superintendent and can state that he didn't read it.

[30] MR. HOUGH: Your Honor—

THE COURT: You're arguing with the witness. Just ask questions. Ask if he read it or didn't he read it. I don't want to get into the arguments.

MR. DAVIDSON: I'm sorry, Judge. I just—

THE COURT: It's all right.

BY MR. DAVIDSON:

Q. So, in other words, Mr. Garcia, you don't know from the time you got the note until Mr. James got hold of the note if he ever read it?

A. I don't know. I can't say that.

Q. Did Mr. Cannon ever refer that matter to anybody else?

A. Just to Mr. James.

Q. Just to Mr. James. He didn't do that himself. He left that upon—he gave that responsibility to you to get it to Mr. James?

A. Yes.

THE COURT: Did you know what the note said?

THE WITNESS: No, sir.

THE COURT: How could you explain to somebody what to do with it if you don't know [31] what it said?

THE WITNESS: Sir, you see, he told me about the threat.

THE COURT: Who is he?

THE WITNESS Mr. Davidson. I—he told me about the threat and I told him to, I told him to put it in writing.

THE COURT: Therefore you knew the note contained information about the threat, am I correct?

THE WITNESS: Yes, sir.

THE COURT: Now, when you brought it to Mr. Cannon, what did you tell Mr. Cannon?

THE WITNESS: I told Mr. Cannon that he, this is a note from Mr. Davidson about a threat from inmate McMillian.

THE COURT: Also Mr. Cannon—you don't know whether he read the note or not but knew what the note was about because you told him, am I correct?

THE WITNESS: Yes, sir.

THE COURT: All right. Then what did he say to you?

THE WITNESS: He told me to take the note to Mr. James.

[32] THE COURT: When you finally were to see Mr. James, what did you tell Mr. James?

THE WITNESS: I told Mr. James about a threat about Mr. Davidson by inmate McMillian.

THE COURT: Mr. James therefore knew about the threat. Whether he read the note or not, he knew about the threat because you told him?

THE WITNESS: I don't know if he read the note.

THE COURT: Regardless of whether he read the note, you told him what the note said?

THE WITNESS: Yes, sir.

THE COURT: Okay. Let's proceed.

MR. DAVIDSON: That's all I have of Mr. Garcia.

THE COURT: You may cross-examine.

CROSS-EXAMINATION BY MR. HOUGH:

Q. Officer Garcia, when you took the note with you to lunch, what did you, where did you have it?

A. Right in my shirt pocket.

Q. Shirt pocket?

A. Yes, sir.

Q. I show you what is marked D-5 which appears to have folds in it. How did you put the note in your [33] pocket?

A. I folded it.

Q. Did you make this fold?

A. Yes, sir, exactly.

Q. Now, when you brought the note to Mr. Cannon's office, did you have it in your hand like that or opened up?

A. It was like that.

Q. When you took the note to Sergeant James' office what did you do?

A. Same way, gave it to him like that.

THE COURT: It makes no difference. There was testimony by this witness that he told them orally what the note contained. I am not concerned whether he read the note or not. As far as I am concerned, I am finding as a fact that they were put on notice and they have the knowledge.

MR. HOUGH: That is a little premature finding of fact, Judge.

THE COURT: It may well be, but, the witness seems very credible to me. I'm impressed with his truthfulness.

BY MR HOUGH:

Q. Officer—

[34] THE COURT: Do you have proof to the contrary?

MR. HOUGH: I have evidence to the contrary, Judge.

THE COURT: All right. I'll hear it. I'm impressed with this witness' explanation to me on the witness stand. Let's proceed.

BY MR. HOUGH:

Q Now, you approached Sergeant James' office between 2:00 and 2:15?

A. That correct.

Q. What was going on in his office at the time you arrived there?

A. I understand that there was some kind of problem with one inmate in the compound and he was suppose to make an investigation.

Q. Was there anyone else in his office?

A. No, sir.

Q. When you approached him do you recall, do you remember telling him that this is a, that this is a note from Davidson?

A. Yes.

Q. Do you remember saying that the note, the contents of the note concerned a threat?

A. I believe so.

[35] Q. You believe so?

A. Yes.

Q. Do you recall that with, can you recall saying that?

A. I might have said that, yeah.

Q. After you dropped off the note what did you do

A. I went back to my office to my duties.

Q. And, did you work the next day?

A. No.

Q. And did you work that Sunday?

A. No, I'm off on weekends.

Q. Did you take any further action with respect to this threat?

A. No.

MR. HOUGH: I have no further questions.

THE COURT: Anything further?

MR. DAVIDSON: Nothing.

THE COURT: Thank you very much. You may step down, sir.

Let me interrupt these proceedings for two minutes. I have to read an Opinion into the record in another matter.

(At which time the Court read into the record an Opinion in a different matter.)

THE COURT: Let's get back to this [36] matter. Mr. Davidson, you may call your next witness.

MR. DAVIDSON: Your Honor, I call Mr. Cannon, please.

JOSEPH CANNON, having been duly sworn was examined and testified as follows:

THE COURT: You can sit back, Mr. Cannon. The microphones are very sensitive. It will pick you up. You may proceed, Mr. Davidson.

DIRECT EXAMINATION BY MR. DAVIDSON:

Q. Mr. Cannon, do you recall the incident that happened on December 19, 1980, that has, that we have been discussing here?

A. Yes, I do.

Q. Do you have, do you have any recollection of your information that has come passed your desk as to the psychological nature of inmate McMillian, the type individual that he is or his characteristics?

A. The only thing I can recall at this point since I am not, you know, no longer assigned to Leesburg in the capacity, you know, at that time is that McMillian was a progmatic-type individual.

THE COURT: What?

A. Progmatic-type individual.

[37] THE COURT: He created problems?

A. Yes.

Q. Well, I was going to ask you, Mr. Cannon, at that time in 1980, December, what was your capacity in Leesburg State Prison?

A. Assistant superintendent.

Q. You carried a little weight, authority, I would say, wouldn't you?

A. I would think that's what the title would deno right.

Q. And, in essence, you were the man on the spot?

THE COURT: Maybe the man on the scene is a better way to put it.

Q. The man on the scene?

A. You're trying to put me on the spot.

Q. The point I meant is, the superintendent did more of a, is more of a figurehead. The assistant superintendent is the man that is dealing with the individuals on an individual basis, more so than the superintendent?

A. No, I don't agree. I am the superintendent now and I disagree with your thinking.

THE COURT: I don't think Mr. O'Lone would agree.

A. I think he would take an exception to it.

[38] THE COURT: Proceed.

Q. I just wanted to establish something here.

Now, do you recall Mr. Garcia coming to you with this particular note I believe D-5?

A. Yes, I do.

Q. What did you tell Mr. Garcia to do with this note?

A. After reading the note I asked Officer Garcia to take it to Sergeant James. In reviewing the note and in fact you and I have known one another for several years—

Q. Quite a few.

A. Right. I did not feel that that particular note afforded any threat, that when you passed that to Mr. Garcia you were within about 30 feet of my office on numerous occasions in the past. You have sent me notes asking for, you know, interviews involving various situations that had arisen during your stay at Leesburg. I felt after reviewing the note you were just going on record to indicate that if there was a potential problem down the road, that you were not going to be the cause of it. It would be inmate McMillian. I did ask if you were available. You had already left the scene but went back to the courtyard or housing unit.

Q. And—we don't need a long explanation. The only point I'm asking you is if you were familiar with the note and if so what actions you took?

A. That's what I'm explaining to you.

Q. You told Mr. Garcia to take it to Sergeant James?

A. Yes.

Q. How long would you say you know me?

A. Well, we go back to Bordentown in the mid-60's.

Q. Early—

A. Early, whatever.

Q. Early 60's.

So have you known me to be a troublemaker as far as physical fights go?

A. Not physical fights, no.

Q. Do you know McMillian to be of the physical type, getting into those kinds of problems?

A. Prior to the incident with you, I do not know if he had any previous altercations involving a fight. No, I do not know that.

Q. Now, when you make a directive such as you did to Mr. Garcia of taking, take this note to Mr. James, you I believe would assume that the matter is taking care of promptly, would you assume that?

A. In reference to Garcia delivering the note to [40] Sergeant James?

Q. Not just at that particular note but, any matter that you might delegate to a subordinate, you assume he is going to, it is going to be taken care of?

A. Without a reasonable period of time.

Q. Whatever the case, reasonable period of time?

A. Yes.

Q. So when we have a case where there is a possible knife in somebody's possession, in their room, that matter could be taken care of within a reasonable amount of time, too, couldn't it?

A. I don't understand you.

Q. The point I am getting at, Mr. Cannon is that Norman Crowder I believe you're familiar with the individual, was supposedly, allegedly, supposed to have a knife in his possession?

A. If you're asking me questions on that particular incident I'm not familiar with it and do not recall that particular incident on that day, no.

Q. Very good. Then, as far as you're concerned, you referred the matter to Mr. James and that was the end of it. It was out of your hands?

A. No. It was referred to Sergeant James for him to investigate the contents of that note and get back [41] to me if he felt there was any action that was warranted.

Q. Is there any reason why you didn't handle it personally?

A. Like I said earlier you and I have known one another for years.

Q. It's personal. It has nothing to do with this—

THE COURT: Let him finish.

A. You have known me for years but you know that you have direct access to my office, even to the point when I first came down to Leesburg you attempted to approach me on a first-name basis. I informed you that that was not the case, that you could call me Mr. Cannon or Cannot, right? You have approached me numerous times on job changes, holding, you know, disciplinary

actions for you. In reviewing that note the fact that you were 30 feet from my office, that you could have asked Officer Peterson to bring, to get directly to me, you could have requested an immediate interview with me and would have been granted. I did not perceive you felt that note contained any threat or that McMillian posed any threat to you.

Q. What action would you have taken had I presented it to you personally?

A. I would have sat down, interviewed you, offered [42] you P.C.

Q. No—

A. Wait. You're asking me what I would have done.

Q. Go ahead.

A. If, after granting the interview I really felt at that point McMillian was a threat to you I would have called McMillian over to the office, confronted McMillian with the facts you have presented, your strong feelings that he was still a threat, either taken action including Mr. McMillian, his behavior left a lot to be desired, or possibly offering a housing change. You know, you could have had a housing change if you wanted it.

Q. You know you can run but you can't hide. That is besides the point, Mr. Cannon. The point I am trying to make here is that you say that had I come to you directly you could have done all these things. But, when the note was presented to you, you didn't, you did nothing, even it wasn't me personally, this note is as far as I'm concerned, it was me personally. Even though it was on paper it was me.

A. Who do you have the note addressed to?

Q. Court-Line Officer. I gave it to him.

A. Like you say earlier—

THE COURT: I don't want to have the [43] colloquy going back and forth. Don't argue with the witness. Don't ask questions. You ask questions and he'll answer them. I will get the conclusion from the testimony.

Q. All right. The thing is that Mr. Garcia is your subordinate. You were the assistant superintendent. You told him to take it to Mr. James. When Mr. James got that note I would imagine that's because you were the assistant superintendent, that some action should have been taken. Would you feel that was why you referred the matter to him?

A. I referred it to Mr. James for his investigation and like I said earlier and you agreed, that was the man to see at Leesburg, according to you. You addressed that to the Hearing Officer. My feelings—and I reiterate it is if you really felt that you had the problem, you know, who to see or, and you stated that.

Q. I—

A. I do not feel the note posed a threat.

THE COURT: That was your conclusion it didn't pose a threat. Let's go on.

MR. DAVIDSON: That's all I have.

THE COURT: You may cross-examine.

CROSS-EXAMINATION BY MR. HOUGH:

[44] Q. How long were you assistant superintendent at Leesburg?

A. Approximately three years.

Q. And, what is your position now?

A. I am superintendent at Mid State. It's a new facility that opened sometime ago, the latter part of May. It's near Fort Dix, more or less.

Q. How many years have you been in Corrections?

A. Approximately 20.

Q. Have, are you—are you—can you give—let me ask you to describe to the Court how often you received notices of threats or alleged threats?

A. Well, you're talking about my capacity at Leesburg?

Q. At Leesburg. All right.

A. I would say several times a week.

Q. Several times a week. Now, you've seen what is marked as D-5, haven't you?

A. Yes, sir.

Q. Now, in your opinion, you testified that is not represent a, does not reflect a serious threat. What about the note, does it not reflect a serious threat in your opinion?

A. What was that again?

Q. Why would you not consider that note to be, [45] to represent a serious threat?

A. Inmate Davidson and I have, you know, ongoing rapport that is based upon several years of being in the system.

THE COURT: Your decision was based on your relationship with him, not on what the note said?

THE WITNESS: Yes. And my knowledge of Davidson, my knowledge of the situation that had occurred involving him and McMillian.

THE COURT: You did read the note?

THE WITNESS: Yes, sir.

BY MR. HOUGH:

Q. If you received that note from another inmate based solely on the language contained in the note, how would you characterize that in light of your experience as a Corrections Officer?

A. I would have dealt with the situation the same way as I dealt with this one.

Q. Why?

A. Because I do not read into this note any apparent threat.

Q. Why?

A. Because the inmate if he felt that he was in fear would have either requested personally to see me, [46] he could have approached the Center lieutenant. He could have asked the officer that works the area where my office was even to the point of a few weeks after that particular incident Mr. Davidson sent me a note indicating that, you

know, him and I were still friends. He realized that something to the extent, you know, he knew that I was not the cause of his problem but, unfortunately, he had to sue me in addition to two other people.

Q. You mentioned the Center. Is that the Center Keeper?

A. Yes.

Q. How would an inmate know how, how would Mr. Davidson know he should contact the Center Keeper?

A. There is a, like a published procedure, you know, and it's the accepted procedure.

MR. DAVIDSON: I object, your Honor, unless we have this procedure here in black and white. I think that we should stop discussing procedures.

THE COURT: Is this procedure a written procedure?

THE WITNESS: I could not tell you at this point.

MR. DAVIDSON: You said, you said it [47] was a printed procedure.

THE COURT: When you left Leesburg was there a written procedure?

THE WITNESS: There was a written procedure in reference to how interviews were handled and things of that nature.

THE COURT: Was there a written procedure when someone made threats against someone, how to handle it?

THE WITNESS: I'm not sure how.

THE COURT: I'll sustain your objection. Let's move along.

BY MR. HOUGH:

Q. Do you recall what you did after referring the day, after you referred the note to Sergeant James?

A. The day after?

Q. No. What did you do that day after you referred the note?

A. I probably had more inmate interviews, inmate appeals. I have no idea of what the remainder of my day was.

Q. Did you work the following day?

A. No. Saturday I had off and I was not on call that weekend, either.

MR. HOUGH: I have no further questions.

[48] THE COURT: Sergeant James ever follow up and give you a report on that note?

THE WITNESS: The incident involving inmate Davidson and McMillian occurred Sunday and Sergeant James, you know, it was already too late to follow up on the note because the altercation had already occurred.

THE COURT: Anything further?

MR. DAVIDSON: No.

THE COURT: You may step down. Thank you very much. Leave the exhibit on the bench.

THE WITNESS: All right.

THE COURT: Call your next witness—let's take a short recess for about ten minutes.

(At which time the court stood in recess.)

(The following takes place in open court following the recess.)

THE COURT: Call your next witness.

MR. DAVIDSON: Mr. James.

ROBERT JAMES, having been duly sworn, was examined and testified as follows:

DIRECT EXAMINATION BY MR. DAVIDSON:

Q. Mr. James, you're aware of D-5?

[49] A. Yes, I am.

Q. How did you become aware of this document, Mr. James?

A. Are you talking about the document or its contents?

Q. The document and the contents of the document?

A. Officer Garcia delivered me the document.

Q. What time did he bring this document to you?

A. In the vicinity of 2:00 to 2:15.

Q. 2:00 to 2:15?

A. Something like that.

Q. Do you recall what day you became aware of the document?

A. It would be December the 19th, 1980, Friday.

Q. Thank you. What action did you take regarding that particular document?

A. Took no action pertaining to that particular document.

Q. What is the normal procedure that you follow when you become aware of a document of this nature?

A. I can't say that there would be a normal procedure. The procedure would vary depending on what is on the document. That is the first document I ever received.

THE COURT: Of this nature?

[50] THE WITNESS: Yes, sir.

BY MR. DAVIDSON:

Q. In this particular matter or in your career as a Corrections Officer?

A. You have to break that down.

Q. You said it was the first time that you received this kind of document. Did you mean in this particular case or since you've been in the Corrections Department?

A. No, in that particular case I guess I would be referring to—

Q. In this matter of—

A. Yes.

THE COURT: Have you ever received a letter before directed to you by any inmates that they're being threatened?

THE WITNESS: Yes, sir.

THE COURT: You have had letters of this nature?

THE WITNESS: Yes, sir.

BY MR. DAVIDSON:

Q. And, after a while, because you're Internal Affairs, you have certain procedures you follow to handle

these kinds of matters. You don't let the matters lay on the desk over a weekend?

[51] A. That's true, but again, as I say, it would depend on what was in the document. A procedure if I received a note like this, the normal procedure for me would me to interview the inmate. Okay.

Q. Either or both of them, the one that wrote the note or the one who wrote the note and the person about who it was written about?

A. Correct.

Q. Was this procedure followed?

A. No, it was not.

Q. Is there a reason why that wasn't followed?

A. It was a situation of circumstances. There was no present, oh, you know, nothing was presented that it should be checked out immediately. I wasn't informed to check it out immediately.

Q. Mr. Garcia brought the note to you—excuse me, sir. Mr. Garcia brought the note to you from the assistant superintendent, Mr. Cannon. Isn't that self-explanatory, I would imagine?

A. Well, I have been delivered many notes from the assistant superintendent, Mr. Cannon, but, that doesn't mean it's an urgent note.

Q. Do you let the notes lay on your desk over the weekend without reading them or taking any action?

A. Not normally, no.

[52] THE COURT: Let me ask you this, sir, did you know the contents of the note?

THE WITNESS: At the time that it was delivered to me I can't say that I knew the contents of the note and its contents.

THE COURT: Mr. Garcia explained to you what the note contained. Didn't he tell you what the note contained?

THE WITNESS: Mr. Garcia, if he had said that he told me what it contained I would certainly stand on his

word. I do not recall any elaboration. I do not recall any great emphasis put on a threat.

THE COURT: Did you not read the note?

THE WITNESS: No, sir, I did not read the note at that time. At that time I was working on an MCU report. I was trying to finish it up. I was working on a case where there was an inmate supposedly having a shank in his cell and stabbed someone else. I at that time had him in the corridor being held by Mr. Peterson, Officer Peterson. I was trying to make arrangements to search the cell.

BY MR. DAVIDSON:

Q. Mr. James—

[53] A. Yes.

Q. I appreciate your sitaution with that knife, the shank that was allegedly put in or in somebody's cell. Couldn't you have picked up the telephone and had the unit officer double-lock that man's cell as you could have gone over there at your leisure, your convenience and searched that cell?

A. I did.

Q. Secure the cell?

A. I did have that cell double-locked at that time.

Q. There isn't an emergency involved as far as that shank is concerned?

A. In my opinion there was an emergency. There was a possibility of a knife involved.

Q. But if the door to the cell is locked where is the emergency? I don't understand that.

A. The emergency is to check to see if there was—

Q. This is information that you received from another inmate?

A. From an officer, Officer Holmes contacted me from the clothing shop.

Q. Who had gotten the information from another inmate?

A. That I feel is true.

[54] Q. All right.

THE COURT: You also said you were doing some MCU work. What is that, is that paperwork?

THE WITNESS: Yes, sir. It's the MCU. It stands for Management Control Unit. At the time I was working on a report I think it was Masco, a problem child and that's what we were working on, to get rid of it.

BY MR. DAVIDSON:

Q. Because—did you in fact, when you got around to searching that particular unit, that individual cell, did you find a shank?

A. No, I did not.

Q. So the information was incorrect?

A. Either way I had to check it out.

Q. Absolutely. Absolutely. I just—there is something here that kind of leaves me a little hung up because, because of your position and Mr. Cannon's position, I can't see how you had not, how you had neglected to take some kind of action on a matter that was referred to you by the superintendent, the assistant superintendent. It leaves me hanging there.

A. The only way I could answer that question, Mr. Davidson, is simply to state that there was no [55] emergency placed on it.

Q. Who is, who has to place the emergency on it?

A. What do you mean who has to place the emergency on it?

Q. Who has to make a matter urgent?

A. Had the note been delivered with me and told to check it out immediately this would have been done.

Q. Now—

A. But I would have, there would have been many things to do so I really can't answer something like that.

THE COURT: When you received this note, was there any message along with the note?

THE WITNESS: You mean from Officer Garcia?

THE COURT: From whoever conveyed the note from the assistant superintendent, what did he say to you?

THE WITNESS: I don't recall the assistant superintendent's name even being mentioned. There was no elaboration put on it. Mr. Garcia, he did indicate that was on a note on Mr. Davidson and possibly he indicated there was a threatening gesture or whatever. [56] I will not deny that. I am not sure but, there was no great elaboration put on it.

THE COURT: There was no communication from the superintendent to you to do certain things?

THE WITNESS: No, sir.

THE COURT: Mr. James, you said you were speaking with an inmate outside being detained by you. You said you had an inmate being detained, who was there because a possible shank was in his cell?

THE WITNESS: That's true.

BY MR. DAVIDSON:

Q. Mr. Crowder, I believe the name was—

A. Right. I called for him. He had been frisked. Then I interviewed him. I had him sent back out to the gate. Then I was making arrangements to search his cell.

Q. What time was this that he was at your office?

A. I couldn't give you an exact time. He came in my office it would have been sometime, you know, on the interview.

Q. Initially, initially what time did he come to you?

A. I'd say probably, shortly after 1:00, 1:15, [57] maybe 2:00.

Q. 1:15?

A. I mean 1:30.

Q. And, how long did he stay there with you or how long was he with you or without you, how long was he kept there?

A. I would say approximately five minutes, maybe ten at the most.

Q. Then he was released?

A. No. He was escorted out to Officer Peterson and told, Officer Peterson was instructed to keep him there until I searched his cell and contacted Officer Peterson to release him.

Q. What time did you get done with Mr. Crowder's cell search? That was Friday, the 19th?

A. Yes. I'll give you the time as four o'clock but, I would like to be able to change that when I come across the paperwork.

THE COURT: Approximation, let's move along.

Q. You were off Saturday and Sunday, Mr. James?

A. Yes.

Q. So your shift on Friday, the 19th, would have been —what would your hours have been on Friday, the 19th?

[58] A. On Friday, the 19th, I would have been working 8:00 to 4:00. Other than the fact that they had contacted me earlier in the morning hours and requested that I work a second shift as an assistant Center Keeper, which would be complete different duties.

Q. So in other words you were there from eight o'clock in the morning until—

A. Ten o'clock at night.

Q. Ten-thirty at night?

A. That's true.

Q. In that four-hour period you never had a chance to read this note that was given to you by Mr. Garcia?

A. Once I took the assignment as assistant Center Keeper which actually started at 2:20, I would be no longer be part of the Department of Internal Affairs, or what have you. I assumed the normal duties of assistant Center Keeper.

Q. But, as I interpret Mr. Hough, here, and as I interpreted Mr. Cannon, they also said that I could have gone to the Center Keeper?

A. That is true.

Q. I could have gone to the Center Keeper on one shift and I couldn't do it on the second shift?

[59] A. True.

Q. You were initially the Internal Affairs in the a.m. and a Center Keeper in the p.m.?

A. That's right.

Q. Couldn't that matter still be handled by your department?

A. I was on the component that night for an additional six hours. I was through the unit. I had an incident in—

Q. Mess hall?

A. Mess hall. There was a threat to kill an officer. I spent several hours in the hold that night trying to calm him down. I was also available in the office for you to come to me if you had a problem.

Q. I thought the—

A. But—

THE COURT: Don't argue. Do you have any further questions?

Q. In other words, in that 14-hour period you didn't have a chance to read this note, even though you were aware of it earlier, much earlier in the day, is that correct?

A. That's correct.

MR. DAVIDSON: That's all, your Honor.

THE COURT: Cross-examine.

[60] CROSS-EXAMINATON BY MR. HOUGH:

Q. The 14-hour period—when was the note brought to you?

A. I would say between 2:00 and 2:15, 2:20, maybe.

Q. And, how late did you work?

A. I worked until 10:20 p.m. that night.

Q. Sergeant, do you, are you currently in the Internal Affairs?

A. That's right, sir.

Q. What is the, what is the duty, what are the responsibilities of the Internal Affairs?

A. Ninety-nine percent of my responsibility is paperwork, referring, in other words when an incident goes

down or what have you, I gather the paperwork that comes from the different departments, what have you, condense it, forward the reports to the superintendent, assistant superintendent, the Commissioner and in special cases I'm told by the assistant superintendent or the superintendent to investigate this or that. It's only under their direction would I investigate anything other than something that comes in that appears to be an emergency that is presented directly to me and then I would refer to them before I would become involved, [61] unless it looks like welfare or, you know.

Q. Now, what about the events leading up to the note being given to you. Was this, did this appear as an emergency?

A. No, sir. Like I said, no great elaboration. Now I would dare say that 99 percent of any P.C. cases we will say where a guy's got a problem he runs directly to the Center. Directly to any supervisor which they had the same authority as I did and, you know, they're locked up for their own protection or under their own requests. I have been referred notes, from—many notes from the assistant superintendent from either Ancora, I'm sorry, the minimum unit or the minimum unit and the assistant Superintendent would get it and say interview this guy he claims he was being threatened or possibly turning State's evidence on a guy in there and—there are many different reasons. Most of your P.C. cases are threats.

THE COURT: What do you mean by P.C.?

THE WITNESS. Protective custody. I would go as far as saying 99 percent of our P.C. cases, whoever comes forth is generally the cause of it. In other words they're in debt, what have you.

[62] THE COURT: Did you know the plaintiff in this case, Davidson? Did you know anything about him?

THE WITNESS: Yes, sir, I do.

THE COURT: Did you know McMillian?

THE WITNESS: I knew who McMillian was. I didn't know him as well as Davidson.

BY MR. HOUGH:

Q. I would like to show you what has been marked D-13.

THE COURT: What is it?

MR. DAVIDSON: I object, your Honor. I never saw that before.

MR. HOUGH: I believe it was sent to him in discovery.

THE COURT: Pardon me?

MR. HOUGH: I believe that was sent to him in discovery, Judge.

MR. DAVIDSON: I believe you're mistaken.

THE COURT: Well, you were at Leesburg for a while, weren't you?

MR. DAVIDSON: Yes.

THE COURT: I am sure you were aware of the operational procedures, were you not?

[63] MR. DAVIDSON: Those are not issued to the inmates. I am sorry, but I don't know what it is.

THE COURT: Show it to Mr. Davidson and maybe he might—did you ever get that in discovery? Was that ever sent to you in discovery?

MR. DAVIDSON: No, your Honor.

MR. HOUGH: It should have been, Judge. If it wasn't I don't know why it wasn't.

THE COURT: Apparently they're the procedures within the prison. Do you have any objection to that?

MR. DAVIDSON: No, I guess not.

THE COURT: Show it to the witness. Let him identify it and then we can move along.

BY MR. HOUGH:

Q. Do you recognize what is marked as D-13?

A. Yes.

Q. What is D-13?

A. They are the ACA, American Correction Association Standards. They are procedures written up by, well actually personnel within the Institution. [64] This set

of procedures and guidelines are for the inmates and staff alike.

Q. Now, are inmates made aware of the procedures on dealing with, procedures for seeking protective custody?

A. All—I wouldn't say all. All standards I believe are ACA's, are in the law library. They have access to them.

MR. HOUGH: I move D-13.

THE COURT: It's in the law library. If someone wants to look it up they would have to go in there, is that what you're saying?

THE WITNESS: That is true, sir.

MR. HOUGH: I move D-13 into evidence.

THE COURT: Any objection to that going into evidence?

MR. DAVIDSON: No, but I would like to see it, your Honor.

MR. HOUGH: I have a copy, Judge.

THE COURT: Give him a copy.

Is there anything further?

MR. HOUGH: Yes, sir.

BY MR. HOUGH:

Q. Mr. James, following the note being delivered [65] to your office, how long did you spent in your office after that?

A. It was a very minimal amount of time. I wouldn't say that it was over ten minutes. Mr. Garcia came in, gave me the note and at the same time I was trying to make contact with the Center. I was putting, I think it was an entry into the logbook to finish up the paperwork and go down to the Center. I left and went directly to well, I went to the Center. They had given me Officer Robinson to search the cell under my supervision. I had the tour forms which plan what we do for the night. I arrived at B-Unit at three o'clock, according to what I

have written down. I left there at 4:00. I then went to staff dining at 4:10, got done staff dining or dining at 4:30. I stood inmate dining at 4:30 until 5:15. While in the dining hall, just as the mess hall was just clearing out there was an inmate Hamlan who threw his tray. He threatened, he threatened, he said he was going to kill Officer Ashton. I came across the dining hall and then I had to go across the compound. I went to B-Unit. I found him in his cell. He was on his hands and knees and as we say, on the commode. At that time he was washing his face out of the hopper and in his cell. So it was apparent that he had a mental [66] breakdown, whatever. That was the reason for throwing his tray and threatening to kill the officer. After I talked him down, he was escorted over to the hospital. I probably spent an hour there with the officers trying to get him calmed down. In fact, I was brought back several times that night because he kept, you know, he tore the lights off the walls, et cetera. During the—I had an assignment of these—there are normal assignments. Now I had to supervise showers and lock-up areas and I had been left a directive to interview three inmates which was Rivera, Santanna—correction, there were two inmates and in regards I had been directed to do this by the chief deputy. I interviewed them and contacted him at home via the phone. It was in regard to a sledge hammer that was found that day. They felt there was a possibility of an escape in effect and I investigated the disciplinary charges. It was normal and routine.

Q. Sergeant James you testified that it's possible that you were told the note concerned a threat, is that correct?

A. That's correct.

Q. Now, do you recall when you left the prison that night whether at that time you remembered any [67] threat or any note about the threat?

A. Negative. If I remembered that all I'd have to do is leave a note on the high-board in the Center which

every Center Keeper reads every morning and they would definitely have been alerted.

Q. Do you bear any malice towards Mr. Davidson?

A. I have no reason to bear any malice against Mr. Davidson, no.

Q. Did you act with any malice towards him at the time of the alleged note?

A. No, sir.

Q. When you left your cell—excuse me. When you left your office to go search inmate Crowder's cell, did you at that time have any reason to believe or did you believe that you were violating his Constitutional Rights?

A. I did not.

THE COURT: Anything further?

MR. HOUGH: No, Judge.

THE COURT: Anything further?

MR. DAVIDSON: Just a couple questions I would like to ask Officer James.

REDIRECT EXAMINATION BY MR. DAVIDSON:

Q. Mr. James, you said that after you read this note, you said that it didn't appear to be a serious [68] threat?

A. I did not say that, Mr. Davidson.

Q. Oh well, please clarify what did you say when you read the note? What were your feelings on that note?

A. I read the note on Monday morning when I returned to work. That is the first time I read that note.

Q. You never read this note prior to your being off duty on Friday night?

A. That is a fact.

Q. Or were you aware of it verbally?

A Yes, I was aware that there was a note because it was delivered to me.

Q. Now, who has more authority in the Institution as far as position goes, the chief deputy or the assistant superintendent?

A. Who has more authority—I don't know which way you're trying to break it down. The assistant superintendent would have more authority.

Q. All right. You got a phone call to investigate Rivera and Santanna?

A. Yes.

Q. You took care of that matter but yet when an assistant superintendent sent the message to you [69] through Officer Garcia you didn't do anything. To me it looks like—

THE COURT: You're not to argue with him. Just ask questions and he'll answer them.

Q. All right. Could you explain the imbalance there?

A. There is no imbalance there, Mr. Davidson. As I stated the note was delivered to me by Mr. Garcia. There was no urgency placed. I had no idea that your life, welfare was at peril.

Q. Who has to place the life or threat to you? You said you didn't read the note. So evidently—

THE COURT: He did not read the note. He was advised of the contents of the note. You're arguing with the witness.

MR. DAVIDSON: I am not. I don't want to argue. I don't understand what it has to appear to be to be a serious threat. What I'm asking is, I'm asking what a serious threat is?

A. I had read the note, okay—or had it been explained to me in a little more emphasis placed on it, possibly I would have taken it more seriously and acted at the time. I'll even go as far as say [70] probably I wouldn't have acted at that immediate time simply because I had other things that I felt had a priority. Now if I felt that there was an emergent necessity to immediately interview you, have you locked up, have someone else locked up or what have you, I would have contacted the assistant superintendent. I did not have that authority which you're aware of. I can only make someone aware of it. Then they act on it.

Q. You made a statement before you said that P.C. cases are generally the cause of the problem?

A. I stated that those that come to me or those that are locked up generally are the cause of the problem, which I think I clarified and I said in most cases they owe a debt.

Q. You said most cases?

A. If they became indebted, then I would consider them as being the cause.

Q. But now you have prior knowledge of McMillian. You know of inmate McMillian, don't you?

A. Yes, I know who inmate McMillian is.

Q. Do you have knowledge of his past abusive history?

A. What term abusive—

Q. Getting into fights and different altercations [71] with other inmates?

A. I will be perfectly honest, the first fight I knew he was involved in was with you and Mr. Gibbs. I referred back through the Court-Line proceedings or the results for the year 1980 and threatening, fights and assault charges I believe it was one charge in a year. So that one charge you know, you don't really place this guy with that guy.

Q. I see. What you're saying is that you said the ACA rules or procedures, these are rules here?

A. Yes.

Q. And the procedures—these are available to any inmate to read?

A. I think I stated that the standards are in the library and I believe the ACA are also in the library and that would make them available to any inmate.

Q. For your information they are not. But that is besides the point.

That is all I have, your Honor. Thank you.

THE COURT: Anything further?

MR. HOUGH: No, Judge.

THE COURT: Thank you very much. You may step down.

Do you have any further witnesses?

MR. DAVIDSON: No, your Honor.

[72] THE COURT: That is it?

MR. DAVIDSON: That is it.

THE COURT: All your witnesses you've subpoenaed are here?

MR. DAVIDSON: No. There's one other officer.

THE COURT: Who is that?

MR. DAVIDSON: Who's not available. It's Officer Gibson.

THE COURT: Has he been subpoenaed?

MR. HOUGH: Yes, your Honor. He was subpoenaed. His subpoena was issued in February. There was no subpoena issued for this thing and I wasn't sure until the Court Clerk called me that he didn't have a lawyer representing him because I had been contacted and so I had no reason to—

THE COURT: Why—if Officer Gibson was here and called to testify what would he testify to? What would be the facts that he would have testified to?

MR. DAVIDSON: He would testify that four days prior to the incident he notified his superiors four days prior to it and—

THE COURT: Well, does the Deputy [73] Attorney General have a statement from that officer?

MR. HOUGH: Yes.

THE COURT: Can we get a stipulation?

MR. HOUGH: Yes. We have if I may two notes. One from Senior Corrections Officer Gibson and I apologize about the copy. It was just difficult to make a good copy from the one I had.

THE COURT: This is from Gibson's statement, Officer Gibson?

MR. HOUGH: Yes. This is the 17th of January and it is to his lieutenant.

THE COURT: Show them to the plaintiff and let him read them and Mr. Davidson having read them if this is the information you would have elicited from Mr. Gibson—

MR. DAVIDSON: Yes, that is it.

THE COURT: How about if we mark them and put them in evidence. We will mark them as P-2 and P-3 and put them in evidence. Give it to the Clerk and he will mark them P-2 and 3 and they will go in evidence.

(At which time the aforementioned exhibits were marked in evidence.)

[74] THE COURT: Any further testimony?

MR. DAVIDSON: No, your Honor.

THE COURT: You rest?

MR. DAVIDSON: Yes.

THE COURT: How about damages? I don't know if you will get damages. I don't know if you will have damages but there has to be some proof as to damages. What are your damages. What did it cost for the operation?

MR. DAVIDSON: The State was kind enough by your Order to take care of it.

THE COURT: Then—

MR. DAVIDSON: A year later, sir.

THE COURT: It didn't cost you anything in terms of the hospital or the operation, is that correct?

MR. DAVIDSON: Correct, your Honor.

THE COURT: All right. What do you say—are you telling me as a result of this fight you sustained an injury, correct?

MR. DAVIDSON: Yes.

THE COURT: You were treated for the injury?

MR. DAVIDON: Quite a few—

THE COURT: And you are saying today—[75] do you have any injuries—how do you feel? Is there anything as a residual for today?

MR. DAVIDSON: Right now, yes.

THE COURT: Well I think what we ought to do, let the plaintiff be sworn and take the witness stand and testify to his injuries.

ROBERT DAVIDSON, having been duly sworn, was examined and testified as follows:

THE COURT: Mr. Davidson, you have testified you were involved in a fight at Leesburg with Mr. McMillian, is that correct?

THE WITNESS: Yes, sir, your Honor.

THE COURT: As a result of that fight, what injuries did you sustain?

THE WITNESS: I sustained a broken nose and many stab wounds about the head, face, neck and body.

THE COURT: Stab wounds made with what?

THE WITNESS: A fork.

THE COURT: Were you treated for those wounds?

THE WITNESS: Yes, I was treated for everything.

THE COURT: Were the stab wounds healed?

[76] THE WITNESS: Yes, your Honor, they did.

THE COURT: Do you have any residual complaints with respect to those stab wounds?

THE WITNESS: To the stab wounds, no. But to the broken nose, yes.

THE COURT: What happened with the broken nose?

THE WITNESS: Well it was fixed eventually about a year later only because the Court ordered it. It was just about when—and when it was fixed I now suffer from a nasal condition where I can't even wear glasses because of the sensitivity to the bridge of the, of my nose. My voice as you can hear is kind of like graveling. I don't know—I suffer from a postnasal condition now.

THE COURT: Those are your determinations right?

THE WITNESS: Yes, your Honor.

THE COURT: Do you have any medical testimony to produce to verify that condition?

THE WITNESS: No, sir.

THE COURT: Are you able to do [77] everything now you could do before?

THE WITNESS: Like as far as what?

THE COURT: Before the injury. Are you able to do everything now that you could do before the injury?

THE WITNESS: I don't know. I have had a chance as far as being a free person—

THE COURT: You've just gotten out of jail, is that it?

THE WITNESS: Yes.

THE COURT: You may cross-examine.

CROSS-EXAMINATION BY MR. HOUGH:

Q. You've testified or you've said before that you have known Mr. Cannon for some years. When did you first get to meet him?

A. We were discussing the medical problems or—

THE COURT: He's only on the stand for purposes of the medical.

MR. HOUGH: Judge, I was going to call him as a witness, anyway.

THE COURT: You may cross-examine him on the medical at this point and make him your witness as far as the other examination is concerned.

Q. All right, Judge.

[78] Now, you testified that the Court ordered the defendants to fix your nose?

A. Pardon me, sir?

Q. The Court ordered the defendants to fix your nose?

A. They didn't. The Court didn't order it but when the defendants asked for a summary judgment and they were denied, it was at that point that they decided to fix my nose.

THE COURT: This Court did not order anyone to fix your nose.

THE WITNESS: No. I just clarified that. But it was at the time of the summary judgment, the denial that the Institution decided to fix my nose.

Q. Were you—

A. After it got broken I asked to get it fixed. They refused to do that.

Q. Who refused?

A. Mr. Cannon personally.

Q. Isn't it true that you were offered to be taken to the hospital to get your nose fixed approximately four days after this incident and you refused?

A. You mean Christmas Eve?

[79] Q. December 26th?

A. That was Christmas Day. I believe it was something like that, yes.

Q. And—

A. I said that it was impossible for me to go at that time, that I was expecting an important visit from somebody close and please reschedule it. It took at least a year, almost to the day for it to be rescheduled.

MR. HOUGH: I have no further questions concerning the injury.

THE COURT: All right. You have no further witnesses?

MR. DAVIDSON: No.

THE COURT: Any doctor's report, medical report?

MR. DAVIDSON: I don' have anything.

THE COURT: Who operated on you?

THE WITNESS: Dr. Whittenborn.

THE COURT: Where is he located?

THE WITNESS: Trenton.

THE COURT: St. Francis Hospital?

THE WITNESSS: His office is in Trenton and St. Francis is in Trenton also.

THE COURT: Were you examined by any [80] doctor at the prison?

THE WITNESS: Prior to or after the operation?

THE COURT: Well, prior to?

THE WITNESS: Prior to, yes. Not—the doctor never examined me in the Institution. He looked at it and said send me out to Dr. Crain in Trenton.

THE COURT: Did Dr. Crain examine you?

THE WITNESS: Never examined me.

Dr. Wittenborn did the operation. They're in post-operative follow up, whatever, after the operation I saw him once or twice in the hospital area and after that I never saw from him or heard from him again.

THE COURT: You don't have any medical report to show me today with respect to what your current condition is, do you?

THE WITNESS: I don't have anything, no, sir.

THE COURT: You rest. Now—do you want to take him on as your witness?

MR. HOUGH: Yes, Judge.

THE COURT: There's been a lot of facts stipulated to. Don't go over them.

[81] How many witnesses are you going to produce?

MR. HOUGH: Besides Mr. Davidson—

THE COURT: Yes.

MR. HOUGH: None.

THE COURT: Let's move along quickly.

DIRECT EXAMINATION OF MR. DAVIDSON BY MR. HOUGH:

Q. Now, at the time that the attack occurred do you know what the time in the morning that was?

A. About 8:30.

Q. You were standing in front of inmate Gibbs' cell, is that correct?

A. Yes, sir.

Q. Now McMillian was upstairs on another tier?

A. Yes, sir.

Q. And, he was yelling at you, right?

A. Yes.

Q. Was he threatening you?

A. Yes.

Q. Was Officer Pritchard there?

A. Yes.

Q. Now, did you inform Officer Pritchard that McMillian was threatening you?

A. I never got a chance to notify Officer Pritchard.

Q. Could you see Officer Pritchard from where you were standing?

[82] A. No. This is in December. All of the windows were iced up and fogged up. Nobody could see around any bend. There are four bends in the unit and you could not see where the officers sat or even from one corner because everything was all iced up, once you have ice inside the windows.

Q. So you didn't see Officer Pritchard?

A. I didn't see him or he didn't see me.

Q. This is marked as Defendant's Exhibit 10. Is this your signature?

A. Yes.

Q. What is this?

A. This is a statement of facts.

Q. Is this a statement—does this refresh your recollection? Have you read it?

A. I read it.

Q. This reflects the facts?

A. Yes.

MR. HOUGH: I move Defendant's Exhibit 10 in evidence as a statement of the plaintiff concerning the incident.

THE COURT: May I see it? Is this your statement, sir?

THE WITNESS: Yes.

THE COURT: Do you have any objection [83] to it going in evidence?

THE WITNESS: No, sir.

THE COURT: D-10 in evidence.

(At which time the aforementionad exhibit was marked in evidence.)

BY MR. HOUGH:

Q. Mr. Davidson, the statement that you made indicates that McMillian was using abusive language, is that correct?

A. Yes, sir.

Q. Now the statement also indicates does it not that—

A. He was on the tier above me.

Q. He came down and he didn't do anything because Officer Pritchard was there?

A. Right.

Q. You didn't know Officer Pritchard was there?

A. Yes. Officer Pritchard was walking in front and McMillian behind, came behind him.

Q. Did you—

A. When Officer Pritchard got to the other end of the tier and made a right turn he now became blinded. Nobody could see him or he couldn't see us.

Q. Did you call to him?

A. The guy was threatening me because McMillian [84] was threatening me and—

Q. Yes.

A. No.

Q. You didn't call to him?

A. No.

Q. Why didn't you?

A. I didn't feel that he was going to do anything or say anything.

Q. Other than verbalize? You didn't feel—you didn't feel that there would be a threat at that time?

A. No.

Q. Now you're—how old are you, now?

A. Forty-eight.

Q. And, how long have you spent in prison?

A. Three and a half years.

Q. How about—

A. I don't think it's important at this point.

THE COURT: Answer the question. I'll decide what is important.

A. What was the question?

Q. How many years have you spent in prison?

A. I know Mr. Cannon from Bordentown, back in the 60's.

Q. All right. Did you spend time in a New York prison?

[85] A. Yes.

THE COURT: What difference does that make?

MR. HOUGH: Judge, I'm trying to establish this is not, this is the plaintiff, that he is familiar with prisons. He is not—

THE COURT: I'll take judicial notice of that. There is no problem.

Q. Now, the note you gave to Officer Garcia, why didn't you go back to the Hearing Officer?

A. Because that was, when he made those threats to me, that was at a later time. That was immediately after the Court-Line. He had gotten done first at Court-Line and was standing on the steps of the unit. I came back shortly afterwards. When I came past him he started making these threats. Now I had one or two choices to do. As far as jail knowledge goes I could have ignored him or I could have punched him before he punched me.

Q. Have you ever been threatened before?

A. No, I got along very well with everybody.

Q. Never threatened in all the years you were in prison?

A. No, no. As a matter of fact if you read Officer Gibson's report four days prior to the incident [86] he said that the Camden crowd was out to get me or whatever and I felt that that was ridiculous. They, the Institution wanted to lock me up—I had to sign a slip saying I was not in fear of my life and then they would let me free and then there'd be no problem.

Q. So your testimony is you didn't go to a Correction Officer at the time because you didn't know to go to a Correction Officer?

A. No, that's not what I said. I already notified Officer Garcia who took care of the matter.

Q. When you went back to the hearing room did you go back to see Officer Garcia or did you go back to see Arthur Jones?

A. To see Arthur Jones. I thought Arthur Jones had the authority or should have had the authority to, to take some corrective action and if he couldn't or if Mr. Garcia couldn't, one of them would notify somebody who could.

Q. You had just gotten through with the three hearings. You had been through the one disciplinary hearing that morning and the one from Mr. Gibbs and the one from Mr. McMillian?

A. It had nothing to do with me.

Q. There were three hearings that morning about [87] that fight?

A. Yes.

Q. Were you aware when you got back to your housing wing, the only person that was found guilty was Mr. Gibbs?

A. Of course.

Q. Was Mr. Gibbs a friend of yours?

A. Yes.

Q. Was he a close friend of yours?

A. Yes.

Q. He was a friend before that?

A. Prior to.

Q. And so that you had this fight, you went to Mr. Gibbs' aid during this fight, the earlier fight?

A. I didn't go to anybody's aid, no. I don't want you to put it like that. They were fighting and I didn't want my friend getting in trouble so I interceded in breaking up the fight. You have to understand Mr. Gibbs and Mr. McMillian were two black guys. I was a white guy. That's why there was a little recurrence later on.

Q. What was it between Mr. Gibbs and Mr. McMillian that caused these problems?

A. I don't know.

Q. You have no idea?

[88] A. No.

Q. Now, you didn't want Mr. Gibbs to get into trouble, correct? That's why you interceded?

A. Yes.

Q. Were you angry when he was found guilty?

A. No.

Q. You weren't angry at all?

A. No. He was fighting.

Q. Weren't you angry that McMillian had not been found guilty?

A. I wasn't angry. I was a little baffled.

Q. Now, isn't it true that is when you went back to Mr. Jones, the Hearing Officer, that you wanted him to change the result of the hearing somehow?

A. Are you asking me a question or telling me?

Q. I am asking you a question.

A. I don't even know where you got that idea from.

THE COURT: The answer to the question is yes or no.

A. No, not at all.

Q. Explain to me why you went back to Mr. Jones?

A. He is the Hearing Officer. He had more authority than Mr. Garcia does. Mr. Garcia is only a, he is there in case there is a problem where the guy becomes verbal, abusive or tries to attack Mr. Jones. [89] Mr. Garcia is there to put a stop to it. That is what Mr. Garcia's job is. So I went to Mr. Jones.

Q. Mr. Jones was back at the hearing room, right?

A. With Mr. Garcia.

Q. Now, isn't it true that the Hearing Officer, the hearing room is entirely separate from your housing unit?

A. Yes.

Q. You have to walk outside to get to the hearing room?

A. Yes.

Q. Were there Correction Officers or anyone in your unit that you could have spoken to when McMillian made the threats?

A. Sure.

Q. Why didn't you?

A. They had no knowledge of what events—

THE COURT: If the issue is having called something to the attention of some official, to call it to their attention I believe the issue is he did or he did not. He spoke to Garcia and that is the issue.

MR. HOUGH: There are issues besides that, your Honor.

THE COURT: Let's move along.

[90] MR. HOUGH: If I may, the one that, I would address this towards the Court. If the Court should rule in the plaintiff's favor the question of damages, what I'm trying to show is that part of the damages are at least due to Mr. Davidson's own negligence and under the *Carry versus Piffins* case, where you applied normal Tort Rules to damages that his own contributory negligence should limit any award.

THE COURT: Are you saying he went to the wrong people and therefore he has to sustain the loss? Is that what you are trying to say?

MR. HOUGH: No, not at all. I am saying Judge, that—if I may continue.

The notice says that you initially ignored the threat. Is that true?

A. I don't recall what it was. Which time?

Q. The note you gave to Sergeant Garcia—

THE COURT: D-5.

Q. Officer Garcia, I'm sorry. So you initially ignored the threats made by Mr. McMillian, is that true?

A. I ignored them and went back to see Mr. Garcia.

[91] Q. First you went back to your housing unit?

A. Yes, standard procedure.

Q. Would you explain the language, I ignored this and went to another person's cell and thought about it. Then I figured I should tell you so if anything develops you would be aware?

A. Right.

Q. What do you mean by that?

A. Because I'm not known to be a physical person. I don't have a reputation for getting into fights and

getting involved in anything like that. So if there is a problem you will know it started somewhere else, not from me, so take whatever corrective actions you can. I think the least they could have done was called him and I down and confronted the both of us and said okay you two guys, I don't want any more shit from both of you. That is all they had to do. He didn't even do that.

Q. So, if anything, you said that if anything did happen you wanted the administration—

A. Forewarned is forearmed. That is the way I felt.

Q. You wanted the Hearing Officer to know that if anything would happen, that you weren't responsible?

A. Obviously. Sure.

[92] THE COURT: Was that the purpose or the purpose for your own safety?

A. You know, I didn't think at the time that I wrote the note I was going to get my nose broken or stabbed. It never entered my mind because it never happened to me before. I was primary concerned that there would not be a further incident or any further problem. If you read the note, D-5, you will see it says in the lower left-hand side, I'm quite content to let this matter drop. But, it seems that McMillian doesn't want to or something like that.

Q. So at the time you wrote that note you didn't foresee being stabbed?

A. Not at all.

Q. You didn't perceive having your nose broken?

A. I didn't foresee anything, really. Just didn't want any further problems.

THE COURT: Anything further?

MR. HOUGH: No, Judge. I have nothing further.

THE COURT: After this altercation were you sent to the infirmary?

THE WITNESS: Yes, your Honor.

THE COURT: How long did you spend in the infirmary?

[93] THE WITNESS: They took me to the infirmary and cleaned up the stab wounds and sent me out to Newcomb Hospital for X-rays.

THE COURT: How long were you there just as an outpatient?

THE WITNESS: The same day.

THE COURT: You came back to the prison?

THE WITNESS: Yes.

THE COURT: How long did it take for your wounds to heal?

THE WITNESS: Oh, a couple of weeks. Now my nose didn't heal.

THE COURT: About the wounds, the stab wounds?

THE WITNESS: Several weeks.

THE COURT: Any pain, any stitches required?

THE WITNESS: No.

THE COURT: What type treatment was required?

THE WITNESS: Just a lot of pain and you know it was—

THE COURT: Did you have scabs and did they heal?

[94] THE WITNESS: Yes.

THE COURT: A couple of weeks it was—

THE WITNESS: About three or four weeks.

THE COURT: About the nose, what problems were caused as a result of the broken nose?

THE WITNESS: Initially or to this day?

THE COURT: Initially?

THE WITNESS: Initially—

THE COURT: Before the operation.

THE WITNESS: A lot of pain because they sent me out to a Dr. Crain in Trenton.

THE COURT: Who sent you there?

THE WITNESS: The Institution. They sent me there and he tried to put it back in place without any kind of anesthesia or anything.

THE COURT: When was that?

THE WITNESS: I think it was about a week afterward.

THE COURT: Did he do something—did he put it back in place?

THE WITNESS: No, it didn't go.

THE COURT: What happened then?

[95] THE WITNESS: Then they sent me back to the prison.

THE COURT: Give you any treatment?

THE WITNESS: No. Nose spray.

THE COURT: And, what, what problems if any were caused as a result of the condition of your nose at that time?

THE WITNESS: I couldn't breathe, you know, they were giving me nose spray by the bottle, every week two or three bottles.

THE COURT: Did you tell that to the doctor?

THE WITNESS: Yeah. The doctor was the one giving me the nose spray.

THE COURT: And you requested additional surgery to get the nose corrected?

THE WITNESS: Many times.

THE COURT: For about a year you were in that condition?

THE WITNESS: Yes.

THE COURT: You can breathe all right now, can't you?

THE WITNESS: I can breathe but I've got a drainage from my head. I don't know what it is doing to my throat. I can breathe [96] better now than before.

THE COURT: Anything further?

MR. HOUGH: No, Judge.

THE COURT: Thank you very much, sir.

Do you have anything further? Is there anything else you want to tell me, Mr. Davidson?

MR. DAVIDSON: No, I think that's it.

THE COURT: All right. You rest then? You are finished?

MR. DAVIDSON: Yes.

THE COURT: Is the State finished?

MR. HOUGH: Yes.

THE COURT: All right. Does the State want to supply me with proposed findings of fact and conclusions of law? Can you do it for me in a week?

MR. HOUGH: Yes, Judge.

THE COURT: Serve a copy on your adversary.

MR. DAVIDSON: You have a right to supply me with proposed findings of fact and conclusions of law. Let me tell you what they are. Proposed findings of fact are taken from the testimony of the witnesses and in effect [97] states facts that I should find as being true with respect to this situation. Conclusions of law are taking certain legal cases and applying that law to those facts. I know you are pro se and you don't have the background to really determine conclusions of law but, certainly if you want to submit to me proposed findings of fact, what facts I should find out of this incident you are perfectly free to do it and have them sent in.

MR. DAVIDSON: Do it in letter form, your Honor?

THE COURT: Do it in any form you want to. Send a copy to your adversary.

Thank you very much, gentlemen. We will stand in recess on this case.

(At which time the matter was concluded.)

CERTIFICATION

I, Stephen J. Daner, an official court reporter for the United States District Court, for the District of New Jersey, at Camden, New Jersey, do hereby certify that the transcript included is an accurate transcription of my stenographic notes taken as set forth.

/s/ Stephen J. Daner
STEPHEN J. DANER
Official Court Reporter,
U.S. District Court,
C.P., R.P.R.

12-30-82
Date

EXHIBITS OF PETITIONER

PLAINTIFF'S EXHIBIT 2

STATE PRISON LEESBURG
LEESBURG, NEW JERSEY

SPECIAL REPORT

TO: Lt. [not legible]

FROM: G. E. Gibson

DATE: 12-17-80

RE:

Sir, it has come to my attention that it would be an unwise move to let Davidson & Gibbs out of L.U. An inmate source has told me that the group from Camden are saying that it's not over yet. It seems that Davidson & Gibbs owe money to Thompson & McMillian.

Respectfully,

/s/ George E. Gibson, Jr.

PLAINTIFF'S EXHIBIT 3

SPL-15

STATE PRISON LEESBURG
LEESBURG, NEW JERSEY

SPECIAL REPORT

TO: Hearing Officer M. A. Jones

FROM: Sgt. J.W. Christman

DATE: 12/18/80

RE:

Sir,

In regards to the fight in D Unit involving inmates Gibbs #62654, MC Millian #63508, Davidson #61681.

I came to the conclusion that McMillian & Gibbs have some kind of hard feelings between each other and it came to a head. I conclude that Davidson did attempt to stop the fight and in the process became involved.

I think there is still some very bad feelings between Gibbs & McMillian, Gibbs stated he was in a bad mood when it happened, Gibbs was not willing to cooperate with Sgt. Walker who made the initial investigation.

/s/ Sgt. J.W. Christman
SGT. J.W. CHRISTMAN

EXHIBIT D 12

When I went back to the unit after seeing you McMillian was on the steps outside the unit. When I was going past him he told me "I'll fuck you up you old mother fucker fag." Go up to your cell, I be right there. I ignored this and went to another person's cell and thought about it. Then I figured I should tell you so "*if*" anything develops *you would be aware.*

I'm quite content to have this matter drop and evidently McMillian is to.

Thank you,

/s/ R. Davidson

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

Civil Action No. 81-253

ROBERT DAVIDSON, PLAINTIFF

v.

EDWARD O'LONE, ETC., ET AL., DEFENDANTS

[Filed October 13, 1982]

APPEARANCES:

Robert Davidson, *Pro se*
242 Undercliff Avenue
Edgewater, New Jersey 07020

Irwin I. Kimmelman, Attorney General of
New Jersey
By: Lyle P. Hough, Jr.,
Deputy Attorney General
Richard J. Hughes Justice Complex
Trenton, New Jersey 08625
Attorneys for Defendants

FINDINGS OF FACT
AND
CONCLUSIONS OF LAW

BROTMAN, District Judge

This is a civil rights action brought pursuant to 42 U.S.C. § 1983 by a state prisoner. He is appearing *pro*

se. The matter having come to trial on May 7, 1982, and the court having considered the evidence, exhibits and the submissions of the parties, we make the following findings of fact and conclusions of law.

FINDINGS OF FACT

1. Plaintiff Robert Davidson was an inmate at the New Jersey State Prison at Leesburg (hereinafter LSP) in December of 1980. He has since been paroled.

2. Defendant Joseph Cannon was the Assistant Superintendent at LSP in December, 1980.

3. Defendant Arthur Jones was a hearing officer for the New Jersey Departmenut of Corrections in December, 1980. He is a civilian assigned by the Commissioner of Corrections to hear disciplinary disputes at a number of institutions, including LSP.

4. Defendant Robert James was a Corrections Sergeant assigned to LSP in December 1980.

5. On December 17, 1980, plaintiff intervened in a fight between two other prisoners at LSP—Gibbs and McMillian. After the fight was broken up, all three inmates received disciplinary charges for fighting and were placed in "lockup" status pending further investigation. The next morning, their status was changed to prehearing detention pending disciplinary hearings.

6. On Friday, December 19, 1980, each inmate had a disciplinary hearing before defendant Jones. Gibbs was found guilty of fighting. Plaintiff and McMillian were found not guilty and released to the general population.

7. After the hearings, McMillian told plaintiff that the fight was not over and verbally threatened to assault plaintiff.

8. Between 9:30 and 10:00 A.M., plaintiff returned to the hearing room and reported McMillian's threat to Officer Jose Garcia, a guard assigned to the hearing room. He stated that he wanted the prison officials to know about it. Officer Garcia told plaintiff to put the informa-

tion in writing. Plaintiff wrote a note, intended for defendant Jones, which stated:

> "When I went back to the unit after seeing you McMillian was on the steps outside the unit. When I was going past him he told me 'I'll fuck you up you old mother-fucking fag.' Go up to your cell, I be right there.
>
> I ignored this and went to another person's cell and thought about it. Then I figured I should tell you so 'if' anything develops you would be aware.
>
> I'm quite content to let this matter drop but evidently McMillian isn't.
>
> Thank you, R. Davidson"

Defendants' Exhibit 5.

9. Plaintiff did not take other steps to secure his safety, such as requesting protective custody or attempting to convey the information to prison officials other than Jones.

10. While plaintiff regarded the threat as serious, he did not foresee the extent of the injuries actually incurred. His purposes in reporting the threat were (a) to have the prison officials intercede on his behalf by calling McMillian down and warning him not to cause trouble; (b) to exonerate himself in the event there was further fighting.

11. Although plaintiff had been in various prisons for many years, plaintiff had never been attacked by another inmate. He had no prior institutional history of being involved in fighting or assaults.

12. Defendant Jones testified that McMillian had a history of assaults and fighting. He believed that if McMillian threatened to attack an inmate, there was some validity to the threat.

13. Defendant Jones instructed Officer Garcia to pass the note to the proper authorities at LSP. Defendant Jones himself was not a part of the institution and had

no authority to take other precautionary action. His responsibilities do not involve the security of inmates.

14. Other disciplinary hearings continued until 11:30 A.M. At 11:40 A.M., Officer Garcia went to defendant Cannon's office to deliver plaintiff's note. Officer Garcia told Cannon that he had a note from Davidson about a threat by McMillian.

15. Cannon read the note, and instructed Officer Garcia to give the note to defendant James. Cannon intended that James investigate the note and get back in touch with Cannon if any action was warranted.

16. Although Cannon knew that McMillian had a history of fighting, he testified that he did not regard the note as reporting a serious threat. He concluded this because he was well-acquainted with plaintiff and believed that if plaintiff had a serious problem, he would have contacted Cannon directly.

17. If Cannon had regarded the threat as serious, he would have taken the following actions: (a) offered plaintiff protective custody or a housing change, and (b) confronted McMillian and warned him to control his behavior. In his experience, such warnings are effective at deterring disruptive conduct. In this case, he took no immediate action.

18. Officer Garcia then went to defendant James' office, but he was not in. Keeping the note in his pocket, Officer Garcia went to lunch. After lunch he again checked James' office, but it was still empty. He succeeded in contacting James by telephone later in the afternoon, and brought the note to James between 2:00 and 2:15 P.M.

19. Officer Garcia told James that the note was being referred to James by Cannon for investigation, and that it reported a threat by McMillian against plaintiff. He did not indicate any urgency about the note.

20. James' usual procedure for investigating such a note is to interview the inmates. He testified that he did not do so because he was not directed to check it out

immediately, and because he had other matters to attend to that he felt were of higher priority.

21. The note was left on James' desk while he investigated a report that an inmate had a knife in his cell. He had the cell secured, and went to search it. There was no knife in the cell. He finished this search about 4:00 P.M.

22. At 4:00 P.M., James' shift in the Department of Internal Affairs was over. He worked a second shift that day as Assistant Center Keeper, and was at the institution until 10:30 P.M. During this second shift, he did not take any action regarding plaintiff's note because he considered that task only as part of his Internal Affairs functions. However, James acknowledged that if plaintiff's note had been directed to him as Center Keeper (his evening post), he should have looked into it. Indeed, both Cannon and James testified that in order to receive prompt attention to the threat, plaintiff should have reported it to Center Keeper, rather than the hearing officer Jones.

23. James spent several hours that evening handling an inmate who in James' opinion was having a mental breakdown and was throwing tantrums.

24. After the note was delivered that afternoon, James spent only about ten minutes in his office. When he left the prison at about 10:30 P.M., he did not remember the note that remained on his desk. He testified that if he had remembered, he would have left it at the Center in order to alert the officers on morning shift.

25. None of the defendants worked on Saturday or Sunday, December 20 and 21, 1980.

26. On Sunday morning, December 21, 1980, McMillian attacked plaintiff at approximately 8:30 A.M. Plaintiff sustained numerous stab wounds inflicted with a metal fork, in his face, neck, head and body. In addition, his nose was broken.

27. Plaintiff was taken to the prison infirmary and then to Newcomb Hospital, a private hospital, for x-rays

and treatment. He was returned to the prison the same day.

28. The stab wounds healed within several weeks and plaintiff has no residual complaints regarding them.

29. Plaintiff was to be admitted to St. Francis Hospital on December 26, 1980, to undergo surgery for his nose, but he requested that it be rescheduled because he expected a holiday visit.

30. The institutional physician, Stephan J. Zionts, D.O., reported by way of affidavit dated September 16, 1981, that plaintiff's diagnosis at that date was "post traumatic external and internal nasal deformities with septal deviation and right posterior nasal obstruction."

31. Plaintiff was admitted to St. Francis Hospital in December of 1981, almost a year after the attack, to undergo the surgical process of septorhinoplasty to correct his condition.

32. During the year interim, plaintiff suffered pain in connection with the broken nose and had difficulty breating. The institutional physician gave him nose spray, which did not alleviate his suffering.

33. After the surgery, plaintiff's breathing improved. He continues to complain of a voice change, sensitivity of the bridge of his nose, and a post nasal drip condition.

CONCLUSIONS OF LAW

Applying the reasoning set forth in our letter opinion of November 16, 1981,[1] we conclude that plaintiff has not

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[1] We note the following errors in that opinion:

1. On page 1, the last sentence of the second paragraph should read, "On Sunday, December 21, 1980. . . ."

2. On page 1, all references in the second paragraph to McMilliam" should read "McMillian."

3. On page 2, the third sentence of the first paragraph should read ". . . about the chain of events of which *plaintiff* complains."

[Continued]

established a claim of cruel and unusual punishment in violation of the Eighth Amendment. We so find because defendants did not act with deliberate or callous indifference to plaintiff's needs and because the incident complained of was a single attack.

We conclude that plaintiff has established, however, by a preponderance of the evidence his claim of unconstitutional deprivation of liberty without due process, as against Cannon and James. We find that these two defendants negligently failed to take reasonable steps to protect plaintiff, and that he was injured as a result. Both of these officials had the responsibility to care for plaintiff's safety, actual notice of the threat by an inmate with a known history of violence, and an opportunity to prevent harm to plaintiff. Defendant Jones, we find, exercised due and reasonable care under the circumstances, as it was not within his responsibility or his authority at the institution to do more than refer the threat to the proper authorities.

Due process analysis has two steps—first, identifying the nature of the interest at stake as a constitutionally protected one, and second, examining what degree of "process" is due. *See, e.g., Martinez v. California*, 444 U.S. 277 (1980).

The first step is to inquire whether the assault here implicates a "liberty interest" protected by the due process clause. Freedom from physical attack and injury undeniably falls within the compass of constitutionally protected liberty. To be free of personal violence is the basic core of liberty. "To be free from, and to obtain judicial relief for, unjustified intrusions on personal security . . .

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[1] [Continued]

4. On page 2, the last sentence of the third paragraph should read, ". . . second, the negligent acts alleged *do* not rise to. . . ."

5. On page 3, the fourth sentence of the first paragraph, following the parenthetical, should read, ". . . had not provided sufficient guidance. . . ."

[is one of] the historic liberties" protected at common law and by the due process clause. *Ingraham v. Wright*, 430 U.S. 651, 672-73 (1977). *See Youngberg v. Romeo*, —— U.S. ——, 102 S.Ct. 2452 (1982). Even while incarcerated, plaintiff enjoys a constitutionally protected interest in conditions of reasonable care and safety.

Defendants emphasize that plaintiff seeks to recover damages for a single attack. They refer to recent statements by the court of appeals that "[t]he right to protection is not actuated by an isolated mishap, or called into question by each bruise that a patient [here, prisoner] may suffer," and that "no one is guaranteed an injury-proof life." *Romeo v. Youngberg*, 644 F.2d 147, 162 (3rd Cir. 1980), *vacated and remanded*, 50 U.S.L.W. 4681 (June 18, 1982). But as defendants have also pointed out, the critical aspect is not the weight of the interest, but its nature. *Board of Regents v. Roth*, 408 U.S. 564, 570-71 (1972). Thus the first analytical step is whether security from assault is within the ambit of "liberty." Whether the assault is aggravated or repeated does not alter its nature, but simply its weight.

Furthermore, the instant case is not about a "bruise" or an inadvertent accident. It does not involve some "de minimis" personal injury, but a vicious and traumatic attack inflicting severe wounds. The defendants were personally apprised of the anticipated assault, and knowing of McMillian's violent character, did nothing to prevent its occurrence. Had reasonable precautions been taken, even as simple as issuing a warning to McMillian, the evidence suggests that plaintiff would not have been injured. Defendants knew that McMillian represented a "special danger" to plaintiff. *Cf. Martinez v. California*, 444 U.S. 277, 285 (1980).

Defendants argue that plaintiff did not enjoy a "liberty interest" in his personal security because defendants did not intentionally permit the assault, but were merely negligent about his safety. This argument confuses the notion of liberty interest with the notion of deprivation.

State of mind has no relevance for purposes of identifying what is a liberty interest and what is not.

Rather, we believe defendants' argument is that state of mind is significant for purposes of determining whether the defendant *deprived* plaintiff of his liberty. Defendants suggest that unless the actions of the state officials were intentional, reckless, or malicious, there has been no "deprivation" of rights. But as we have discussed in our prior opinion, the Supreme Court has held that a state official's negligence is sufficient to constitute a "deprivation" for due process purposes. *Parratt v. Taylor*, 451 U.S. 527 (1981). We do not agree with defendants that *Parratt's* holding regarding negligent deprivation is irrelevant to the instant case on the ground that *Parratt* involved a property rather than a liberty interest. We do not believe these categories are so rigid. The distinction between property and liberty interests does not alter the relevant reasoning, which is that § 1983 does not include a requirement that the official's act be intentional.[2] Defendants assert that we should impose a "deliberate indifference" standard, borrowed from the Eighth Amendment. *See Estelle v. Gamble*, 429 U.S. 97 (1976). This standard was rejected as inappropriate under due process analysis in *Youngberg v. Romeo*, 102 S.Ct. at 2456 n.11.

Defendants Cannon and James, acting under authority of state law, negligently deprived plaintiff of his liberty interest in remaining free from physical assault. This brings us to the second step of due process analysis, to inquire whether the state has provided the "process" which is due under the circumstances. As we discussed in our prior opinion, New Jersey provides plaintiff no process whatsoever by which to pursue a remedy against

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[2] We would also point out that *Parratt* involved only an "isolated" incident of loss of property, valued at a very modest sum. Nonetheless, despite the fact that the interest was not very "weighty," the court identified its nature as one protected by the due process clause. This confirms our opinion that plaintiff has satisfied the first analytical step of showing a "liberty interest" at stake.

the state or state officials for injuries inflicted by another prisoner. N.J. Stat. Ann. 59:5-2 (West 1982).

The fact that plaintiff may have a tort claim against a different tortfeasor, the inmate McMillian, is immaterial. The question is not whether plaintiff has redress against some other party, but whether there is some process by which to remedy the deprivation of his liberty at the hands of the state officials. The tort claims procedures in Nebraska and Florida, analyzed in *Parratt v. Taylor*, *supra*, and *Ingraham v. Wright*, *supra*, provided a means by which the injured party could seek compensation from the state or state official responsible. New Jersey has cut off any such avenue of redress, thereby denying plaintiff his due process rights.

Defendants suggest that "the state will become an absolute insurer of the safety of people within its borders, as long as a causal nexus can be found between the injury and some action or inaction by the State." Defendants' Supplemental Trial Brief at 8-9. This alarming proposition is not the result of our decision. The state officials who are here defendants are liable only because two other criteria are also present: that their negligence caused the injury, and that the state provides no process by which to seek redress for the officials' action. Defendants also claim that this result will "transform every tort committed by a state employee into a civil rights complaint. . . ." Brief at 13. We would point out that the state of New Jersey does afford a tort claims procedure for most victims of official tortfeasors; an exception was carved out of the act to exclude persons in plaintiff's situation from any procedural avenues, even a tort action against the state employees. Prior to the Tort Claims Act, such a tort action was available. *Harris v. State*, 61 N.J. 585 (1972).

Finally, defendants argue that they are shielded from liability in this case by the "qualified immunity" for prison officials upheld in *Procunier v. Navarette*, 434 U.S. 555 (1978). This immunity is founded on the premise

that such officials "cannot be expected to predict the future course of constitutional law," *id.* at 562, and should not be held responsible for acts which were reasonably considered not to constitute an infringement of the prisoner's rights. The court held that since the right there violated, freedom from interference with prisoners' mail, had not been declared by the courts until several years after the officials confiscated or lost the mail in question, qualified immunity protected the officials. They had no way of knowing that the prisoner had First Amendment rights in connection with his mail.

We do not believe that the instant case is similar. Defendants do not assert that they were unaware that a prisoner had a right to be free from personal assaults. Nor do they assert that they did not have a duty to protect him from such attacks. Instead, they assert that they did not know they would be held responsible for their *negligence* in denying plaintiff this right. But this obviously could not have influenced their actions—negligence is by its nature unintentional. We believe that *Procunier v. Navarette* focussed on situations in which a new substantive right has been announced after the allegedly wrongful behavior; we do not believe that it immunizes officials because of an intervening change in the requisite standard regarding state of mind. The important factor is that defendants, by their negligent conduct, subjected plaintiff to an unreasonable risk of physical attack, knowing that plaintiff was entitled to freedom from such assault.

Plaintiff's injuries, stab wounds and a broken nose which had to be surgically corrected, were serious and entailed severe pain over a significant period of time. We find that an award of $2,000.00 in compensatory damages is an appropriate judgment. Accordingly, judgment will be entered in favor of plaintiff and against defendants Cannon and James, jointly and severally, in the amount of $2,000.00. Our finding of no liability on

defendant Jones' part will be reflected by judgment in his favor for no cause of action.

An appropriate order will be entered.

/s/ Stanley S. Brotman
STANLEY S. BROTMAN
United States District Judge

Dated: October 13, 1982

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

Civil Action No. 81-253

ROBERT DAVIDSON, PLAINTIFF

v.

EDWARD O'LONE, ETC., ET AL., DEFENDANTS

[Filed October 13, 1982]

ORDER

This action having come to trial on May, 1982; and

The court having considered the testimony, exhibits, and arguments and submissions of the parties; and

For the reasons set forth in the court's findings of fact and conclusions of law filed this date,

It is on this 13th day of October, 1982, hereby ORDERED that judgment is entered for defendant Arthur Jones and against plaintiff Robert Davidson for no cause of action; and

It is FURTHER ORDERED that judgment is entered in favor of plaintiff Robert Davidson and against defendants Joseph Cannon and Robert James, jointly and severally, in the sum of two thousand dollars ($2,000.00).

No costs.

/s/ Stanley S. Brotman
STANLEY S. BROTMAN
United States District Judge

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 82-5743

ROBERT DAVIDSON

vs.

EDWARD O'LONE, Supt., JOSEPH CANNON, Ass't. Supt., ARTHUR JONES, Hearing Off., SGT. ROBERT JAMES, Internal Affairs

JOSEPH CANNON and ROBERT JAMES, APPELLANTS

(D.N.J. Civ. No. 82-5743)

Present: SEITZ, *Chief Judge*, and ALDISERT, ADAMS, GIBBONS, HUNTER, WEIS, GARTH, HIGGINBOTHAM, SLOVITER and BECKER, *Circuit Judges*.

ORDER

A majority of the active judges having voted for rehearing in banc in the above, it is ORDERED that the Clerk of this Court list the above case for rehearing before the court in banc at the convenience of the Court.

BY THE COURT.

/s/ [Illegible]
Circuit Judge

Dated: March 22, 1984

UNITED STATES COURT OF APPEALS
THIRD CIRCUIT

No. 82-5743

ROBERT DAVIDSON

v.

EDWARD O'LONE, Superintendent, ARTHUR JONES, Hearing Officer, JOSEPH CANNON, Superintendent, and ROBERT JAMES, Internal Affairs

APPEAL OF JOSEPH CANNON and ROBERT JAMES

Argued Dec. 1, 1983

Reargued In Banc May 7, 1984

Decided Dec. 27, 1984

Originally Argued Dec. 1, 1983

Before GIBBONS and SLOVITER, Circuit Judges, and GREEN, District Judge.*

Reargued In Banc May 7, 1984

Before ALDISERT, Chief Judge **, SEITZ, GIBBONS, HUNTER, WEIS, GARTH, HIGGINBOTHAM, SLOVITER and BECKER, Circuit Judges.

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* Hon. Clifford Scott Green, United States District Judge for the Eastern District of Pennsylvania, sitting by designation.

** At the time of the reargument in banc, Judge Seitz was Chief Judge.

Madeleine W. Mansier (argued), Deputy Atty. Gen., Irwin I. Kimmelman, Atty. Gen. of New Jersey, Trenton, N.J., for appellants Joseph Cannon and Robert James; James J. Ciancia, Asst. Atty. Gen., Trenton, N.J., of counsel.

James D. Crawford (argued), Schnader, Harrison, Segal & Lewis, Philadelphia, Pa., for appellee.

OPINION OF THE COURT

SLOVITER, Circuit Judge.

The principal issue presented by this appeal is whether 42 U.S.C. § 1983 encompasses a claim for personal injury to a state prisoner based on the negligence of prison officials when New Jersey state law provides no remedy.[1]

I.

Plaintiff Robert Davidson was an inmate at Lesburg State Prison when, on December 17, 1980, he intervened in a fight between two other inmates, Gibbs and McMillian. The three had disciplinary hearings on the morning of December 19, and immediately afterward McMillian threatened Davidson. Davidson returned to the hearing room to report the incident and, at the request of the guard on duty, wrote a note intended for Arthur Jones, the hearing officer. The note said:

> When I went back to the unit after seeing you McMillian was on the steps outside the unit. When I was going past him he told me "I'll fuck you up you old mother-fucking fag." Go up to your cell, I be right there.
>
> I ignored this and went to another person's cell and thought about it. Then I figured I should tell you so "if" anything develops you would be aware.

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[1] This appeal was originally heard by a panel of this court and then reheard by the court in banc pursuant to Chapter IX.A. of the Internal Operating Procedures of this court.

I'm quite content to let this matter drop but evidently McMillian isn't.

Thank you, R. Davidson.

Da14.

Jones, to whom the note was addressed, was a civilian and not part of the prison administration. He told the guard, Jose Garcia, to pass the note to the proper officials. At 11:40 a.m. Garcia delivered it to Joseph Cannon, assistant superintendent of the prison. Cannon read it and told Garcia to give it to Corrections Sergeant Robert James. Cannon testified later that he did not regard the situation as urgent because Davidson, whom he had known for years, did not contact him directly, as he had previously done in various situations.

Sergeant James was not in his office, and Garcia did not get the note to him until after 2:00 p.m. Garcia told him then that the note reported a threat by McMillian against Davidson. James attended to other matters, which he described as emergencies, leaving the note on his desk. At 4:00 he started a second shift, as Assistant Center Keeper, in another part of the prison. Between the time he received the note and the time he left the prison that night, James spent only about 10 minutes in his office. He forgot about the note, which he had not read. James acknowledged that in such a situation he would ordinarily interview the inmates. Though he was not able to attend to the matter that day, he testified that if he had remembered the note he would have posted it at the Center to alert officers on the morning shift.

Davidson, as the parties have stipulated, took no other steps to notify the authorities or request protective custody. He testified that he did not foresee the attack, but wrote the note to exonerate himself in the event that McMillian started another fight. Davidson also testified that he wanted officials to reprimand McMillian.

Neither Cannon nor James worked on December 20 or 21. On December 21, McMillian attacked Davidson with

a fork, inflicting wounds to his face, neck, head and body, and breaking his nose. Though the stab wounds healed within several weeks, Davidson has undergone surgery to correct problems stemming from his broken nose, suffering continuing pain and residual effects.

Davidson was foreclosed from recovery from these defendants for his injuries under state law, for the New Jersey Tort Claims Act provides that "[n]either a public entry nor a public employee is liable for . . . any injury caused by . . . a prisoner to any other prisoner." N.J.Stat.Ann. § 59:5-2(b)(4) (West 1982). The parties agree that as a result of this provision, Davidson has no state law claim for his injuries against the defendants or against the state.

Davidson brought suit in the United States District Court for the District of New Jersey under 42 U.S.C. § 1983, naming as defendants Cannon, James, Jones, and Edward O'Lone, the prison superintendent. The court granted summary judgment in favor of O'Lone. The case against the other three was tried with Davidson appearing *pro se*. The court concluded that plaintiff did not establish an Eighth Amendment violation "because defendants did not act with deliberate or callous indifference to plaintiff's needs and because the incident complained of was a single attack." Da18. The court concluded, however, that Cannon and James, but not Jones, negligently failed to take reasonable steps to protect Davidson, that Davidson was injured as a result, and that their negligence deprived Davidson of a constitutionally protected liberty interest in freedom from assault while in prison. The court reasoned that because the New Jersey immunity provision denied Davidson a hearing, Davidson had been deprived of his liberty interest without due process. Davidson was awarded compensatory damages of $2,000.

Defendants appeal, contending that the district court erred in concluding that they were negligent, that the

court erred in concluding that an inmate such as Davidson in a state prison has a liberty interest in being protected by prison officials from a single assault by another inmate, and that the court erred in concluding that 42 U.S.C. § 1983 encompasses a claim arising out of a negligent failure by prison officials to protect an inmate against a single assault by another inmate. We will consider these contentions seriatim.

II.

After hearing all of the relevant evidence, the district court concluded, with respect to Cannon and James:

> We find that these two defendants negligently failed to take reasonable steps to protect plaintiff, and that he was injured as a result. Both of these officials had the responsibility to care for plaintiff's safety, actual notice of the threat by an inmate with a known history of violence, and an opportunity to prevent harm to plaintiff.

Da18.

Appellants concede that the applicable standard by which we must review the findings of the district court when sitting without a jury is the "clearly erroneous" standard contained in Rule 52(a) of the Federal Rules of Civil Procedure. *See Pullman-Standard v. Swint*, 456 U.S. 273, 287, 102 S.Ct. 1781, 1789, 72 L.Ed.2d 66 (1982). Appellants thus bear the heavy burden of convincing us that the district court determination either "is completely devoid of minimum evidentiary support displaying some hue of credibility," or "bears no rational relationship to the supportive evidentiary data." *Krasnov v. Dinan*, 465 F.2d 1298, 1302 (3d Cir.1972).

The appropriate standard of care owed by prison custodians in New Jersey with respect to the risk of inmate injury was set forth in *Harris v. State*, 61 N.J. 585, 297 A.2d 561 (1972). As the court stated there, a prisoner is

owed "a duty of due care while in custody" and further, "in appropriate circumstances [the prisoner] would be entitled to a recovery on a showing that a prison official negligently failed to discharge his responsibility for the [prisoner's] care with resulting injuries to him." *Id.* at 590, 297 A.2d at 563. The *Harris* court denied recovery because the defendants had received no warning of a danger to the plaintiff. In this case, the district court found that the defendants had "actual notice of the threat by an inmate with a known history of violence," Da18, which we find satifies the *Harris* notice requirement. *See also* Restatement [Second] of Torts § 320 (1965).

Appellants challenge the district court findings as clearly erroneous on several grounds. They contend that the district court erred in finding that they knew about McMillian's past, that they failed to exercise reasonable care to protect Davidson, and that their failure to follow the prison procedures proximately caused the injury. However, while we agree that on this record there would be room for the trier of fact to have reached a different conclusion as to negligence, we cannot hold that there was no negligence as a matter of law nor that we are "left with the definite and firm conviction that a mistake has been committed" by the district court in reaching its findings. *United States v. U.S. Gypsum Co.*, 333 U.S. 364, 395, 68 S.Ct. 525, 542, 92 L.Ed. 746 (1948). Thus we accept the determination that defendants were negligent in failing to take steps to prevent McMillian's assault on Davidson.

III.

Appellants argue that the district court erred as a matter of law when it identified a "liberty interest" protected by the Due Process Clause to be free from physical attack and injury. Since § 1983, by its own terms, provides redress only when state employees infringe those rights "secured by the Constitution and laws" of the United States, *see, e.g., Paul v. Davis*, 424 U.S. 693, 700-01, 96 S.Ct. 1155, 1160, 47 L.Ed.2d 405 (1976);

Smith v. Spiva, 477 F.2d 1140, 1143 (3d Cir.1973), plaintiff must satisfy this threshold requirement before we need reach the question whether simple negligence can give rise to § 1983 liability. *See Baker v. McCollan*, 443 U.S. 137, 140, 99 S.Ct. 2689, 2692, 61 L.Ed.2d 433 (1979). We must, therefore, decide whether plaintiff as a state prisoner had a constitutionally protected "liberty interest" in security from physical assault by fellow prisoners.

The constitutional right on which Davidson relies is that of his liberty interest in personal security protected by the Fourteenth Amendment. That the amendment covers such a basic personal right was affirmed by the Supreme Court in *Ingraham v. Wright*, 430 U.S. 651, 673, 97 S.Ct. 1401, 1413, 51 L.Ed.2d 711 (1977), where it stated, "Among the historic liberties [protected by the due process clause] was a right to be free from, and to obtain judicial relief for, unjustified intrusions on personal security."

Davidson's status as a prisoner does not deprive him of his right to rely on the Fourteenth Amendment. Because an inmate is not free to leave the confines which s/he is forced to share with other prisoners, the state bears the responsibility for the inmate's safety. Undoubtedly, a similar responsibility stemming from the state's control over the plaintiff underlay the Court's finding of a liberty interest in *Ingraham*, where the plaintiff was in a public school, in *Youngberg v. Romeo*, 457 U.S. 307, 102 S.Ct. 2452, 73 L.Ed.2d 28 (1982), where the plaintiff was an inmate of a state institution for the mentally retarded, and in *City of Revere v. Massachusetts General Hospital*, 463 U.S. 239, 103 S.Ct. 2979, 2983, 77 L.Ed.2d 605 (1983), where the plaintiff was injured while being apprehended by the police. The Supreme Court has "repeatedly held that prisons are not beyond the reach of the Constitution." *Hudson v. Palmer*, —— U.S. ——, ——, 104 S.Ct. 3194, 3198, 82 L.Ed.2d 393 (1984). As it recently stated, "[W]e have insisted that prisoners be accorded those rights not fun-

damentally inconsistent with imprisonment itself or incompatible with the objectives of incarceration." *Id.*

This court held in *Curtis v. Everette*, 489 F.2d 516, 518 (3rd Cir.1973), *cert, denied*, 416 U.S. 995, 94 S.Ct. 2409, 40 L.Ed.2d 774 (1974), that the Due Process Clause is a valid basis for a prisoner's § 1983 action seeking relief for injuries inflicted by another prisoner.[2] In *Curtis*, the allegations that defendant prison officials stopped the plaintiff prisoner from defending himself from an attack by another prisoner were held to implicate the plaintiff's constitutional "right to be secure in his person" under the Fourteenth Amendment. *Id.*

Appellants argue that the substantive due process right to personal security does not protect a state prisoner from an isolated attack by another prisoner. In so arguing, appellants have contracted into one issue what are in fact two separate issues, whether the liberty interest in bodily integrity protected by the Fourteenth Amendment covers the state's failure to prevent attacks by other prisoners and the circumstances under which § 1983 provides a remedy for deprivation of that interest. Our focus in this section is directed only to the Fourteenth Amendment liberty interest.

As to that, we find no Supreme Court precedent that would limit the protected liberty interest in freedom from attack to those attacks inflicted by the state officials themselves. Certainly it would be absurd to argue that

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[2] Other courts have treated a prisoner's § 1983 claim against prison officials for failure to protect against unjustified intrusions in personal security as raising an Eighth Amendment claim, *see, e.g., Wade v. Haynes*, 663 F.2d 778, 781 (8th Cir. 1981), *aff'd on other grounds sub nom. Smith v. Wade*, 461 U.S. 30, 103 S.Ct. 1625, 75 L.Ed.2d 632 (1983); *Withers v. Levine*, 615 F.2d 158 (4th Cir.), *cert. denied*, 449 U.S. 849, 101 S.Ct. 136, 66 L.Ed.2d 59 (1980); *Clappier v. Flynn*, 605 F.2d 519 (10th Cir. 1979); *Parker v. McKeithen*, 488 F.2d 553 (5th Cir.), *cert. denied*, 419 U.S. 838, 95 S.Ct. 67, 42 L.Ed.2d 65 (1974). Nothing in these opinions, however, signifies rejection of such a claim premised upon the Fourteenth Amendment. In *Holmes v. Goldin*, 615 F.2d 83 (2d Cir. 1980), the court accepted a claim predicated on both bases.

a state prisoner does not have a liberty interest that would be infringed were his or her state custodian deliberately to open the prison door knowing that a lynch mob converged outside. The state infringement would be as direct as if the prison guard had tied the rope around the prisoner's neck. The fact that there was only a single or isolated episode is irrelevant in determining whether a liberty interest was implicated.

That such a liberty interest covers attacks committed by persons other than state custodians has been recently affirmed in *Youngberg v. Romeo*, 457 U.S. 307, 102 S.Ct. 2452, 73 L.Ed.2d 28 (1982). Romeo, an involuntarily committed resident of a state institution for the mentally retarded, claimed in his § 1983 suit against administrators of the institution that his substantive right, *inter alia*, to safe conditions of confinement protected by the due process clause of the Fourteenth Amendment was violated because state officials were aware of and failed to take all reasonable steps to prevent his injury by other residents and by his own violence. The Court expressly recognized and reaffirmed the substantive liberty interest under the Fourteenth Amendment implicated by this claim. The Court stated:

> In the past, this Court has noted that the right to personal security constitutes a "historic liberty interest" protected substantively by the Due Process Clause. *Ingraham v. Wright*, 430 U.S. 651, 673 [97 S.Ct. 1401, 1413, 51 L.Ed.2d 711] (1977). And that right is not extinguished by lawful confinement, even for penal purposes. *See Hutto v. Finney*, 437 U.S. 678 [98 S.Ct. 2565, 57 L.Ed.2d 522] (1978).

Id. at 315, 102 S.Ct. at 2458. Thus we reject appellants' contention that Davidson had no interest protected by the Constitution.

IV.

The reasoning by which the district court concluded that Davidson was entitled to recover in this § 1983 ac-

tion against Cannon and James is as follows: Cannon and Jones were negligent; as a result of that negligence, Davidson was injured; freedom from bodily injury is a liberty interest which is protected by the Fourteenth Amendment of the Constitution; New Jersey does not provide prisoners, such as Davidson, with a remedy in state court because it immunizes its employees against claims for injuries to a prisoner caused by another prisoner, ergo Davidson can recover under § 1983. We have noted our agreement with the district court's reasoning up to the step at which it concluded that § 1983 liability extends to the negligent conduct of the prison officials in failing to investigate or take other action to protect Davidson.[3] We turn now to that question, denominated as "elusive" by the Supreme Court. *Baker v. McCollan*, 443 U.S. 137, 140, 99 S.Ct. 2689, 2692, 61 L.Ed.2d 433 (1979).

There are literally hundreds of cases in the Courts of Appeals in which various aspects of this issue have arisen and no clearly discernible thread has evolved. As the Supreme Court has recognized, "The diversity in approaches [among the various federal courts] is legion." *Parratt v. Taylor*, 451 U.S. 527, 533, 101 S.Ct. 1908, 1912, 68 L.Ed.

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[3] An enigmatic footnote in *Baker v. McCollan*, 443 U.S. 137, 140 n. 1, 99 S.Ct. 2689, 2692 n. 1, 61 L.Ed.2d 433 (1979), appears to distinguish between the question of defendant's state of mind as bearing on "whether a constitutional violation has occurred in the first place" and "whether § 1983 contains some additional qualification of that nature." Subsequent commentary has drawn a substantive distinction between the two questions. *See, e.g.*, S. Nahmod, Civil Rights & Civil Liberties Litigation § 3.02 (Supp. 1983). However, in earlier cases, the Court treated the scope of § 1983 and the Fourteenth Amendment correlatively. *See, e.g., Paul v. Davis*, 424 U.S. 693, 699, 96 S.Ct. 1155, 1159, 47 L.Ed.2d 405 (1976). For purposes of this case, the questions whether negligent conduct by state officials is a deprivation of Fourteenth Amendment rights and whether it can be redressed by suit under § 1983 appear to be mirror images of each other.

2d 420 (1981).[4] We begin, therefore, by examining the Supreme Court's own treatment of the issue.

Until the Court's decision in *Monroe v. Pape*, 365 U.S. 167, 81 S.Ct. 473, 5 L.Ed.2d 492 (1961), there was little case law dealing with violations of § 1983 since most of the civil rights litigation against state officers before that time involved 18 U.S.C. § 242, the criminal counterpart to § 1983. In *Monroe v. Pape*, the Court held, *inter alia*, that because § 1983, unlike § 242, does not contain the word "willfully," proof of "willfullness" should not be required of a plaintiff seeking recovery under § 1983. The Court defined "willfully" as the doing of an act with "a specific intent to deprive a person of a federal right." *Id.* at 187, 81 S.Ct. at 484. Justice Harlan, who concurred, addressed the relationship between the state action encompassed in § 1983 and that covered under ordinary state tort law. He stated that one must attribute "to the enacting legislature the view that a deprivation of a constitutional right *is significantly different from and more serious than a violation of a state right* and therefore deserves a different remedy even though the same act may constitute both a state tort and deprivation of a constitutional right." *Id.* at 196, 81 S.Ct. at 488 (emphasis added).

The language and some of the holdings of the subsequent Supreme Court cases considering this issue reflect the Court's rejection of the notion that every state tort

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[4] The academic commentary has also been distinguished by its diversity of opinion. *See, e.g.*, Kirkpatrick, *Defining a Constitutional Tort Under Section 1983: The State-Of-Mind Requirement*, 46 U.Cin.L.Rev. 45 (1977); McClellan & Northcross, *Remedies and Damages for Violation of Constitutional Rights*, 18 Duq.L.Rev. 409 (1980); Whitman, *Constitutional Torts*, 79 Mich.L.Rev. 5 (1980); Note, *Basis of Liability in a Section 1983 Suit: When is the State-Of-Mind Analysis Relevant?*, 57 Ind.L.J. 459 (1982); Note *Section 1983 Liability for Negligence*, 58 Neb.L.Rev. 271 (1978); Note, *A Theory of Negligence for Constitutional Torts*, 92 Yale L.J. 683 (1983).

committed by a state officer acting under color of state law is *ipso facto* converted into a violation of § 1983. Thus, for example, in *Estelle v. Gamble*, 429 U.S. 97, 97 S.Ct. 285, 50 L.Ed.2d 251 (1976), the Court held that a state prisoner subjected to medical malpractice does not automatically have a claim under § 1983. The Court stated, "Medical malpractice does not become a constitutional violation merely because the victim is a prisoner. In order to state a cognizable claim, a prisoner must allege acts or omissions sufficiently harmful to evidence deliberate indifference to serious medical needs." *Id.* at 106, 97 S.Ct. at 292.

In a case decided earlier that year, *Paul v. Davis*, 424 U.S. 693, 96 S.Ct. 1155, 47 L.Ed.2d 405 (1976), the Court, speaking through Justice Rehnquist, held that a citizen defamed by police through circulation of a flyer of "active shoplifters" on which his name and photograph appeared did not state a claim for relief under § 1983 and the Fourteenth Amendment. The Court expressly rejected the premise that "the Due Process Clause of the Fourteenth Amendment and § 1983 make actionable many wrongs inflicted by government employees which had heretofore been thought to give rise only to state-law tort claims." *Id.* at 699, 96 S.Ct. at 1159. Justice Rehnquist stated that such a premise "would be contrary to pronouncements in our cases on more than one occasion with respect to the scope of § 1983 and of the Fourteenth Amendment." *Id.*

The authority on which Justice Rehnquist relied was *Screws v. United States*, 325 U.S. 91, 65 S.Ct. 1031, 89 L.Ed. 1495 (1945), where Justice Douglas had written for the plurality:

> Violation of local law does not necessarily mean that federal rights have been invaded. The fact that a prisoner is assaulted, injured, or even murdered by state officials does not necessarily mean that he is deprived of any right protected or secured by the Constitution or laws of the United States.

Id. at 108-09, 65 S.Ct. at 1039, *quoted in Paul v. Davis*, 424 U.S. at 700, 96 S.Ct. at 1160. Justice Douglas' opinion in *Screws* continued with the caution that Congress should *not* be understood to have attempted

> to make all torts of state officials federal crimes. It brought within [the criminal provision] only specified acts done 'under color' of law and then only those acts which deprived a person of some right secured by the Constitution or laws of the United States.

325 U.S. at 109, 65 S.Ct. at 1039, also *quoted in Paul v. Davis*, 424 U.S. at 700, 96 S.Ct. at 1160. Although Justice Douglas in *Screws* was construing the criminal analogue to § 1983, these passages of the *Screws* opinion were used as applicable authority by the majority in *Paul v. Davis* in its interpretation of § 1983. Indeed, Justice Rehnquist then proceeded to apply the analysis from *Screws* to reject the claim that defamation by the police fell within the scope of § 1983 and of the Fourteenth Amendment. Justice Rehnquist wrote:

> [Plaintiff] apparently believes that the Fourteenth Amendment's Due Process Clause should *ex proprio vigore* extend to him a right to be free of injury wherever the State may be characterized as the tortfeasor. But such a reading would make of the Fourteenth Amendment a font of tort law to be superimposed upon whatever systems may already be administered by the States. We have noted the "constitutional shoals" that confront any attempt to derive from congressional civil rights statutes a body of general federal tort law, *Griffin v. Breckenridge*, 403 U.S. 88, 101-102 [91 S.Ct. 1790, 1797-1798, 29 L.Ed.2d 338] (1971); *a fortiori*, the procedural guarantees of the Due Process Clause cannot be the source for such law.

Paul v. Davis, 424 U.S. at 701, 96 S.Ct. at 1160.

Shortly thereafter, in *Procunier v. Navarette*, 434 U.S. 555, 98 S.Ct. 855, 55 L.Ed.2d 24 (1978), the Supreme Court appeared ready to decide directly the issue before us since it granted certiorari to consider "[w]hether negligent failure to mail certain of a prisoner's outgoing letters states a cause of action under section 1983." *Id.* at 559 n. 6, 98 S.Ct. at 858 n. 6. Because the Court decided that the defendants were entitled to prevail on the defense of qualified immunity as a matter of law, it did not reach the question on which certiorari was granted.

Thereafter, in *Baker v. McCollan*, 443 U.S. 137, 99 S.Ct. 2689, 61 L.Ed.2d 433 (1979), the Court again confronted this question. Again, the Court disposed of the case on other grounds since it held that no constitutional right was implicated because the defendant police officer charged with false imprisonment under § 1983 had acted on the basis of a valid arrest warrant. However, in his discussion concerning whether negligent conduct can form the basis of an award of damages under 42 U.S.C. § 1983, Justice Rehnquist, once more writing for the Court, stated:

> Having been around this track once before in *Procunier, supra*, we have come to the conclusion that the question whether an allegation of simple negligence is sufficient to state a cause of action under § 1983 is more elusive than it appears at first blush. It may well not be susceptible of a uniform answer across the entire spectrum of conceivable constitutional violations which might be the subject of a § 1983 action.

Id. at 139-40, 99 S.Ct. at 2692.

The duty upon which liability was sought to be predicated in *Baker v. McCollan* was closely akin to that Davidson relies on here. Plaintiff McCollan had been falsely imprisoned because his brother, the real culprit, had used plaintiff's driver's license as his identification. The Court of Appeals held that plaintiff's complaint

stated a claim for relief under § 1983 because under tort law "the sheriff or arresting officer has a duty to exercise due diligence in making sure that the person arrested and detained is actually the person sought under the warrant and not merely someone of the same or similar name. *See* Restatement (2d) Torts § 125, comment (d) (1965)." *McCollan v. Tate*, 575 F.2d 509, 513 (5th Cir. 1978). Thus in *McCollan*, as in this case, plaintiff's claim was based on obligations under tort law of those state officials who have custody of prisoners.

The Supreme Court, in reversing the Court of Appeals decision, rejected the contention that the duty imposed by tort law would be automatically transmuted into a duty protected by the Constitution. Justice Rehnquist stated:

> Section 1983 imposes liability for violations of rights protected by the Constitution, not for violations of duties of care arising out of tort law. Remedy for the latter type of injury must be sought in state court under traditional tort-law principles. Just as "[m]edical malpractice does not become a constitutional violation merely because the victim is a prisoner," *Estelle v. Gamble*, 429 U.S. 97, 106 [97 S.Ct. 285, 292, 50 L.Ed.2d 251] (1976), false imprisonment does not become a violation of the Fourteenth Amendment merely because the defendant is a state official.

Id. 443 U.S. at 146, 99 S.Ct. at 2695-2696.

Thus, nothing in the Court's cases through 1979 provides any support for the principle that negligent conduct by a state official causing injury to the person constitutes a deprivation of a Fourteenth Amendment right which can be redressed in a § 1983 suit. As authority for that position the district court read the Supreme Court's opinion in *Parratt v. Taylor*, 451 U.S. 527, 101 S.Ct. 1908, 68 L.Ed.2d 420 (1981), as holding "that a

state official's negligence is sufficient to constitute a 'deprivation' for due process purposes." Da20. We turn to *Parratt* to determine if it supports the broad construction given it by the district court.

In *Parratt* the plaintiff prisoner brought an action claiming that his now famous hobby materials valued at $23.50 were negligently lost by prison officials in violation of his right under the Fourteenth Amendment not to have his property taken without due process of law. Plaintiff's claim was ultimately rejected by the Supreme Court, which held that because there were state remedies that could have fully compensated plaintiff for the property loss he suffered, the requirements of due process had been satisfied. 451 U.S. at 537-44, 101 S.Ct. at 1913-17. Recently, in *Hudson v. Palmer*, —— U.S. ——, 104 S.Ct. 3194, 82 L.Ed.2d 393 (1984), the Court extended the *Parratt* holding to apply as well to certain intentional deprivations of a prisoner's property. It stated,

> [W]e hold that an unauthorized intentional deprivation of property by a state employee does not constitute a violation of the procedural requirements of the Due Process Clause of the Fourteenth Amendment if a meaningful postdeprivation remedy is available. For intentional, as for negligent deprivations of property by state employees, the State's action is not complete until and unless it provides or refuses to provide a suitable postdeprivation remedy.

Id. 104 S.Ct. at 3204. (emphasis added)

The holdings of *Parratt* and *Hudson* that the available state postdeprivation remedies provide adequate procedural due process do not meet the substantive due process issue presented in this case. However, in *Parratt*, before reaching the procedural due process issue Justice Rehnquist, writing for the Court, considered the scope of § 1983, and wrote:

> Nothing in the language of § 1983 or its legislative history limits the statute solely to intentional deprivations of constitutional rights. In *Baker v. McCollan* [443 U.S. 137, 99 S.Ct. 2689, 61 L.Ed.2d (1979)], we suggested that simply because a wrong was negligently as opposed to intentionally committed did not foreclose the possibility that such action could be brought under § 1983 . . . . Section 1983, unlike its criminal counterpart, 18 U.S.C. § 242, has never been found by this Court to contain a state-of-mind requirement. The Court recognized as much in *Monroe v. Pape*, 365 U.S. 167 [81 S.Ct. 473, 5 L.Ed.2d 492] (1961) . . .
>
> Both *Baker v. McCollan* and *Monroe v. Pape* suggest that § 1983 affords a 'civil remedy' for deprivations of federally protected rights caused by persons acting under color of state law without any express requirement of a particular state of mind.

451 U.S. at 534-35, 101 S.Ct. at 1912-13 (footnote omitted).

Admittedly, this language standing alone is susceptible of the interpretation placed upon it by the district court that mere negligence can constitute a deprivation that can be redressed by a § 1983 action. However, in the context of the development of the law set forth above, we conclude *Parratt* does not so hold.

Most significant is that in the two earlier cases also authored by Justice Rehnquist, *Baker v. McCollan*, decided only two years before *Parratt*, and *Paul v. Davis*, the Court vigorously rejected the suggestion that traditional torts became constitutional violations when committed by state officials. It is implausible that the Court would make a major pronouncement that constituted a 180 degree turnabout as to the scope of substantive due process or § 1983 without discussion or analysis. This is particularly so because early in the *Parratt* opinion the Court specifically noted that it had "twice granted

certiorari in cases to decide whether mere negligence will support a claim for relief under § 1983," 451 U.S. at 532, 101 S.Ct. at 1911 (citing *Procunier v. Navarette*, 434 U.S. 555, 98 S.Ct. 855, 55 L.Ed.2d 24 (1978) and *Baker v. McCollan*, 443 U.S. 137, 99 S.Ct. 2689, 61 L.Ed.2d 433 (1979)) and stated that "in each of those [the Court] found it unnecessary to decide this issue." *Id.* Had the Court intended to finally decide the issue in *Parratt* that it had expressly left open previously, it is reasonable to expect that it would have done so affirmatively.

Instead, what the Court did was reiterate the statements in *Monroe v. Pape* and *Baker v. McCollan* that § 1983 was not limited to intentional deprivation of constitutional rights. That proposition is not the obverse of one stating that § 1983 encompasses suits for negligence by state officials, because there is a broad range of actions between the two poles. Indeed, Justice Powell, concurring in the result in *Parratt*, observed that the Court "passe[d] over the threshold question—whether a negligent act by a state official . . . constitutes a deprivation of property for due process purposes." *Id.* 451 U.S. at 547, 101 S.Ct. at 1919. Thus, nothing in the Court's opinion in *Parratt* leads us to conclude that the Court held that merely negligent conduct by state officers constitutes a constitutional deprivation encompassed by § 1983.

Of course, the absence of any conclusive Supreme Court holding that requires us to construe § 1983 as encompassing all claims for negligence does not necessarily foreclose that interpretation. However, our own court's opinions, as well as precedent from other circuits that we find persuasive, have concluded that negligence claims are not encompassed within § 1983. We reaffirm that conclusion, in large measure because of what we view as the purpose and essence of § 1983.[5]

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[5] The Civil Rights Acts of 1870 and 1871, codified today as 42 U.S.C. §§ 1981, 1982, 1983, 1985, and 1986 were enacted to enforce

The essential element of a § 1983 action is abuse by a state official of his or her official position. *Monroe v. Pape*, 365 U.S. at 172, 81 S.Ct. at 476. Justice Brennan has emphasized that "Section 1983 focuses on '[m]isuse' of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law." *Paul v. Davis*, 424 U.S. at 717, 96 S.Ct. at 1168 (dissenting opinion) (emphasis in original) (quoting *United States v. Classic*, 313 U.S. 299, 326, 61 S.Ct. 1031, 1043, 85 L.Ed.2d 1368 (1941)).

In *Kent v. Prasse*, 385 F.2d 406 (3d Cir. 1967) (approvingly discussed by Justice Powell in his separate opinion in *Parratt*, 451 U.S. at 550-51, 101 S.Ct. at 1920-21), we held that a tort committed by a state official acting under color of state law is not, in and of itself, sufficient to show an invasion of a person's constitutional rights under § 1983. That position was reiterated in a subsequent series of cases. *See Black v. Stephens*, 662 F.2d 181, 188 (3d Cir. 1981), *cert. denied*, 455 U.S. 1008, 102 S.Ct. 1646, 71 L.Ed.2d 878 (1982); *Smith v. Spina*, 477 F.2d 1140, 1143 (3d Cir. 1973); *Howell v. Cataldi*, 464 F.2d 272, 277 (3d Cir. 1972); *Nettles v. Rundle*, 453

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the newly ratified Civil War Amendments in the hostile southern states. As Justice Harlan said in his dissent in the *Civil Rights Cases*, 109 U.S. 3, 44, 3 S.Ct. 18, 45, 27 L.Ed. 835 (1883), the pervading purpose of those amendments was to secure "the freedom of the slave race, the security and firm establishment of that freedom, and the protection of the newly-made freeman and citizen from the oppression of those who had formerly exercised unlimited dominion over him" (quoting *The Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 21 L.Ed. 394 (1872)). Section 1983 originated as § 1 of the Act of April 20, 1871, 17 Stat. 13, and "was passed by a Congress that had the Klan 'particularly in mind.'" *Monroe v. Pape*, 365 U.S. at 174, 81 S.Ct. at 477 (quoting Randall, The Civil War and Reconstruction, 857 (1937)). Referring frequently to a 600-page report documenting outrages against blacks that had gone unpunished, the 42d Congress sought a remedy "against those who representing a State in some capacity were *unable* or *unwilling* to enforce a state law." *Id.* at 176, 81 S.Ct. at 478 (Court's emphasis).

F.2d 889 (3d Cir. 1971). As we said in *Rhodes v. Robinson*, 612 F.2d 766, 772 (3d Cir. 1979), "Where a person suffers injury as an incidental and unintended consequence of official actions, the abuse of power contemplated in the due process and [eighth] amendment cases does not arise." [6]

Various other courts since *Parratt* have also agreed that simple negligence does not suffice to state a claim under § 1983. *See Hull v. City of Duncanville*, 678 F.2d 582, 584 & n. 2 (5th Cir.1982) (construing *Parratt*); *Mills v. Smith*, 656 F.2d 337, 340 n. 2 (8th Cir.1981) (per curiam) (construing *Parratt*). *But see Howard v. Fortenberry*, 723 F.2d 1206, 1209 n. 6 (5th Cir.1984); *McKay v. Hammock*, 730 F.2d 1367, 1373 (10th Cir. 1984.)

A construction that § 1983 does not encompass negligence actions does not restrict its function as the primary vehicle to provide redress for unconstitutional action by state employees that violates the constitution.[7] We eschew prescribing a comprehensive litmus test to determine which actions are or are not within § 1983 particularly since such a test has so far eluded the Supreme Court, but the pattern emerges from earlier cases.

Application of force by police officers or prison guards exceeding that which is reasonable and necessary under

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[6] As our analysis of *Parratt* shows, the statement in *Holman v. Hilton*, 712 F.2d 854 (3d Cir. 1983), reading *Parratt* as holding "as a general matter, that § 1983 affords a remedy for negligent deprivation of federally protected rights by persons acting under the color of state law," *id.* at 856, is too broad. It was, in an event, unnecessary to the holding of the case that the established state procedure at issue violated due process.

[7] Although in this case we deal with due process violations under the Fourteenth Amendment the constitutional deprivation supporting § 1983 recoveries is not limited to that provision. *See e.g., Brule v. Southworth*, 611 F.2d 406 (1st Cir. 1979) (discharge for exercise of First Amendment rights); *Tinetti v. Wittke*, 620 F.2d 160 (7th Cir. 1980) (strip search for traffic violation infringed Fourth Amendment).

the circumstances states a claim under § 1983 *Black v. Stephens*, 662 F.2d at 188; *Howel v. Cataldi*, 464 F.2d at 282; *Martinez v. Rosado*, 614 F.2d 829 (2d Cir.1980). Similarly, if the officials encouraged others to use extensive force, the officials would be liable. *See Black v. Stephens*, 662 F.2d at 189 (alternative basis for liability against police chief was policy of encouraging police officers to use excessive force).

Liability under § 1983 may be imposed on prison officials even when the assault has been committed by another prisoner, if there was intentional conduct, deliberate or reckless indifference to the prisoner's safety, or callous disregard on the part of prison officials. *See Wade v. Haynes*, 663 F.2d 778, 780-81 (8th Cir. 1981), *aff'd on other grounds sub nom. Smith v. Wade*, 461 U.S. 30, 103 S.Ct. 1625, 75 L.Ed.2d 632 (1983) (verdict sustained against correctional officers and the superintendent of the reformatory for placing the prisoner in a dangerous situation in which it was highly foreseeable that the assault would occur); *Holmes v. Goldin*, 615 F.2d 83, 85 (2d Cir. 1980) (prisoner assaulted by another prisoner entitled to an opportunity "to show purposeful acts on the part of the correction officers or deliberate indifference to his safety amounting to a violation of due process.") This is consistent with our holding in *Curtis v. Everette*, 489 F.2d at 518, that allegations by a prisoner of "intentional conduct" by prison officials who stopped him from defending himself when assaulted by another prisoner stated a § 1983 claim.

Other cases provide examples of conduct beyond mere negligence that fall within the scope of § 1983. In *Stokes v. Delcambre*, 710 F.2d 1120, 1124 (5th Cir.1983), the court held that "the jury could have concluded that the jail was administered in a manner virtually indifferent to the safety of prisoners" and that under those facts, the defendants would be held to have violated the prisoners' constitutional rights, whether expressed in Fifth or Eighth Amendment terms. Moreover, when officials with

a responsibility to prevent harm, such as prison officials, fail to establish or execute appropriate procedures for preventing serious malfunctions in the administration of justice, such failure would support a claim under § 1983. *See, e.g., Murray v. City of Chicago*, 634 F.2d 365 (7th Cir.1980), *cert. dismissed sub. nom. Finley v. Murray*, 456 U.S. 604, 102 S.Ct. 2226, 72 L.Ed.2d (1982). Similarly, a regulation issued by the Police Chief delaying disciplinary hearings against police officers until adjudication of the underlying arrest charges which caused officers to file unwarranted charges against plaintiff fell within § 1983, *Black v. Stephens*, 662 F.2d at 189-90.

Another vital area in which § 1983 plays an effective role is in providing a federal forum to challenge an established state procedure that infringes upon an individual's liberty or property interests, such as the Illinois procedure by which a claim could be terminated through no fault of the claimant declared invalid in *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 102 S.Ct. 1148, 71 L.Ed.2d 265 (1982), or the New Jersey statute prohibiting prisoners from bringing tort actions against public entities or employees while confined struck down in *Holman v. Hilton*, 712 F.2d 854 (3d Cir.1983).

We thus reaffirm that actions may be brought in federal court under § 1983 when there has been infringement of a liberty interest by intentional conduct, gross negligence or reckless indifference, or an established state procedure.[8] The viability of such § 1983 actions does not depend on whether or not a postdeprivation remedy is available in state court. We do not read anything to the contrary in the holdings in *Parratt* and *Hudson*, which concerned a prisoner's property right. It is untenable that the Court intended in those cases to subject all suits for unconstitutional acts under color of law, including those implicating a liberty or life interest, to a state

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[8] Judges Weis and Garth do not believe that this case presents the issue of gross negligence and do not join in the reference to it.

remedy, if available. Such an interpretation would deprive § 1983 of its original remedial purpose to "aid [in] the preservation of human liberty and human rights", *see* remarks of Representative Shellabarger during the Congressional debates surrounding the passage of the forerunner of § 1983, *quoted in Owen v. City of Independence*, 445 U.S. 622, 636, 100 S.Ct. 1398, 1408, 63 L.Ed.2d 673 (1980), and would reduce its scope to the rare instances where the state has foreclosed a remedy, as here. The Court has repeatedly declined to require exhaustion of state remedies for § 1983 actions. *See Patsy v. Florida Board of Regents*, 457 U.S. 496, 500, 102 S.Ct. 2557, 2559-60, 73 L.Ed.2d 172 (1982); *Steffel v. Thompson*, 415 U.S. 452, 472-73, 94 S.Ct. 1209, 1222, 39 L.Ed. 2d 505 (1974) ("When federal claims are premised on [§ 1983] we have not required exhaustion of state judicial or administrative remedies)". We read *Parratt* and *Hudson* as decided in the context of prisoners' interests in their personal property which were fully redressable by the available state remedies.

In contrast, at issue here is a liberty interest. In determining whether behavior deprives the plaintiff of a substantive Fourteenth Amendment liberty interest, we must again focus on what constitutes due process. As the Supreme Court stated in *Palko v. Connecticut*, 302 U.S. 319, 325, 58 S.Ct. 149, 152, 82 L.Ed. 288 (1937), the Due Process Clause imposes requirements of decency and fairness because they are "implicit in the concept of ordered liberty". In *Rochin v. California*, 342 U.S. 165, 72 S.Ct. 205, 96 L.Ed. 183 (1952), the Court described a violation of substantive rights under the Due Process Clause as "conduct that shocks the conscience." *Id.* at 172, 72 S.Ct. at 209. The Court did not say whether anything less would suffice, and it declined to formulate a test: "Due process of law, as a historic and generative principle, precludes defining, and thereby confining, these standards of conduct more precisely than to say that convictions cannot be brought about by methods that offend 'a sense of justice.'" *Id.* at 173, 72 S.Ct. at 210.

The conduct of the two prison officials here fails to rise to that level. Cannon followed the established procedure in directing Davidson to the proper officer, but he simply failed to follow up. James, who was operating under a double shift burden, merely forgot to investigate a prisoner's note, which was ambiguous as to the nature of the threat, and conveyed no sense of urgency. When the only finding is that of mere negligence, as here, we cannot find the "outrageousness" or abuse of official power that warrants raising the tortious conduct of the prison official to the level of a deprivation of constitutional right within the scope of § 1983. *Accord Branchcomb v. Brewer*, 669 F.2d 1297, 1298 (8th Cir.1982) (per curiam) (Eighth Amendment) *Williams v. Kelley*, 624 F.2d 695, 697-98 (5th Cir. 1980) (Fourteenth Amendment) *cert. denied*, 451 U.S. 1019, 101 S.Ct. 3009 69 L.Ed.2d 391 (1981).

In summary, we hold that § 1983 retains its central role in affording remedies for victims of constitutional deprivation, but that such a role does not extend to providing a remedy for the type of negligence found in this case.[9]

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[9] Our holding avoids the anomalies that would result were a prisoner's § 1983 suit such as this under the Fourteenth Amendment to be judged under a lesser standard of care than the deliberate indifference standard applicable to a prisoner's Eighth Amendment claim, *see Estelle v. Gamble*, 429 U.S. 97, 97 S.Ct. 285, 50 L.Ed.2d 251 (1976), or were a prisoner to be entitled under the Constitution to a higher standard of care than an involuntarily committed mental patient, *see Youngberg v. Romeo*, 457 U.S. 307, 102 S.Ct. 2452, 73 L.Ed.2d 28 (1982).

Some members of this court believe that in circumstances such as those presented here, the Eighth Amendment standard is the same as that of the substantive due process clause of the Fourteenth Amendment, and that consistency demands that the Fourteenth Amendment not proscribe conduct the Eighth Amendment permits. *See Williams v. Mussomelli*, 722 F.2d 1130, 1132-34 (3d Cir. 1983). *See also Rhodes v. Robinson*, 612 F.2d 766 (3d Cir. 1979) (discussion of opinions applying similar standards in cases arising under the two amendments).

However, other members of the court believe the standard for liability under § 1983 "may well not be susceptible of a uniform answer across the entire spectrum of conceivable constitutional

V.

Davidson has suggested that his claim should be viewed as one of deprivation of procedural due process. His contention appears to be that when New Jersey enacted the statute foreclosing suit by a prisoner against either the state or a prison employee for injuries suffered by another prisoner, N.J.Stat.Ann. 59:5-2(b)(4) (West 1982), it violated his right to procedural due process. For a number of reasons we reject this claim.

In the first place, plaintiff here, unlike the plaintiff in *Holman v. Hilton*, 712 F.2d 854 (3d Cir.1983), has not challenged the constitutionality of the statute. Plaintiff's claim, instead, is only for money damages from the defendants for the injuries inflicted by the assault.

In the second place, a claim for procedural due process must be predicated on deprivation of a substantive right or interest created by the Constitution, a statute or other entitlement. *Bishop v. Wood*, 426 U.S. 341, 344, 96 S.Ct. 2074, 2077, 48 L.Ed.2d 684 (1976); *Meachum v. Fano*, 427 U.S. 215, 96 S.Ct. 2532, 49 L.Ed.2d 451 (1976). Since we have repected Davidson's claim that his substantive right under the Fourteenth Amendment was deprived by defendants' negligence, and there has been no claim of a statutory or other entitlement, there is nothing to trigger an inquiry into what process is due.

In any event, nothing in the Constitution insures that a putative plaintiff may maintain a particular type of negligence claim in state court. The tradition of immunity was firmly rooted before the passage of § 1983. *See Owen v. City of Independence*, 445 U.S. 622, 637-38, 100 S.Ct. 1398, 1408-09, 63 L.Ed.2d 673 (1980). In *Martinez v. California*, 444 U.S. 277, 281-83, 100 S.Ct. 553, 557-58,

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violations which might be the subject of a § 1983 action." *See Baker v. McCollan*, 44 U.S. at 139-40, 99 S.Ct. at 2692. Because the district court in this case found that there was no Eighth Amendment violation, and no cross-appeal has been filed, the Eighth Amendment issue is not before us.

62 L.Ed.2d 481 (1980), the Court rejected the claim that a state statute which foreclosed a tort suit established a federal constitutional violation. In sustaining the dismissal of a § 1983 action brought for death caused by a released parolee, the Court held constitutional a state statute similar to that here providing all public entities and public employees with immunity from liability for their action in releasing a parolee.

Nor do we find any merit in plaintiff's argument which seeks to distinguish between previously existing immunities and those recently created. As the Court stated in *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 432, 102 S.Ct. 1148, 1156, 71 L.Ed.2d 265 (1982):

> the State remains free to *create* substantive defenses or immunities for use in adjudication—or to eliminate its statutorily created causes of action altogether—just as it can amend or terminate its welfare or employment programs.

(emphasis supplied). The Court explained in *Ferri v. Ackerman*, 444 U.S. 193, 198, 100 S.Ct. 402, 406, 62 L.Ed.2d 355 (1979), "For when a state law creates a cause of action, the State is free to define the defenses to that claim, including the defense of immunity, unless, of course, the state rule is in conflict with federal law." *See Daniels v. Williams*, 720 F.2d 792, 798 (4th Cir. 1983).

The implication of Davidson's procedural due process claim is almost unlimited. It would subject to procedural due process scrutiny every state decision to immunize a public entity and employee from discrete claims, *see, e.g.*, N.J.Stat.Ann. 59:4-6, (creating immunity from liability caused by the plan or design of public property). Davidson has provided no authority to support such a far reaching extension of procedural due process,[10] and the available authority, as stated above, is to the contrary.

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[10] The New Jersey provision struck down in *Holman v. Hilton*, 712 F.2d 854 (3d Cir. 1983), did not create a substantive defense

VI.

For the foregoing reasons we will reverse the judgment of the district court and direct entry of judgment for defendants.

GARTH, Circuit Judge, concurring, with whom WEIS, Circuit Judge, joins: [1]

Although I have joined Judge Sloviter's majority opinion, I write separately to express my view that even if mere negligence could constitute a deprivation of Davidson's liberty interest (a proposition with which I do not agree) there is no requirement or reason that a remedy must be provided by 1983 in federal court. Stated differently, just because no remedy is available to Davidson under state law, it does not follow that *some* remedy must be made available *somewhere*—and that therefore the remedy in this case must be a constitutionalized remedy under 1983. I suggest that only an incomplete analysis can reach such a result and that if an appropriate procedural due process analysis is employed,[2] the result in this case

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but instead precluded a prisoner from asserting the cause of action to which s/he was entitled until the prisoner was released from prison. *Id.* at 857-58. That holding is not jeopardized by this opinion.

[1] Both Judge Weis and Judge Garth join the majority opinion.

[2] As the majority opinion correctly states (Maj. Op. at page 830) a claim for procedural due process arises only after a deprivation of some substantive right or interest created by the Constitution, by statutes, or by other entitlement. *Bishop v. Wood*, 426 U.S. 341, 344, 96 S.Ct. 2074, 2077, 48 L.Ed.2d 684 (1976); *Meachum v. Fano*, 427 U.S. 215, 96 S.Ct. 2532, 49 L.Ed.2d 451 (1976). Because the majority of this court has rejected Davidson's claim that his substantive right under the Fourteenth Amendment was deprived by the defendants' negligence, the majority opinion had no occasion to consider a procedural due process analysis. I would not do so either were it not for the position taken by our colleagues, who are not in the majority that a procedural due process analysis would

will be no different than the result at which the majority opinion has arrived by distinguishing between property and liberty interests. In both circumstances, Davidson still cannot prevail over the State and its officials.

I.

If New Jersey, as it has here, provides immunity against Davidson's claim, then an appropriate due process analysis should be concerned with whether the state's interest in protecting its prison officials in such a situation outweighs Davidson's interest in having available a monetary cause of action against prison officials for merely negligent conduct. The particular balance to be struck must measure the state's interest in crafting its own tort laws and immunities against Davidson's interest in having more extensive remedies than those afforded by state law.[3]

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provide Davidson with a 1983 action in federal court and would thus lead to a result contrary to the result reached by the majority.

For purposes of this discussion, therefore, I will assume that mere negligence by state officials could constitute a deprivation of Davidson's liberty interest. However, it does not follow from that assumption that the remedy must be provided in federal court pursuant to section 1983. To hold that negligent conduct by a state official serves to convert duties imposed by state tort law into substantive constitutional violations which lay the necessary predicate for a procedural due process inquiry is not a result compelled by *Parratt v. Taylor*, 451 U.S. 527, 101 S.Ct. 1908, 68 L.Ed.2d 420 (1981).

[3] There is analogous precedent for this type of balancing of interests where immunity has been upheld in a variety of circumstances. See *Nixon v. Fitzgerald*, 457 U.S. 731, 102 S.Ct. 2690, 73 L.Ed.2d 349 (1982) (President is absolutely immune from suit); *Butz v. Economou*, 438 U.S. 478, 513-14, 98 S.Ct. 2894, 2914-15, 57 L.Ed.2d 895 (1978) (Administrative Law Judge employed by Executive Branch absolutely immune from prosecution); *Imbler v. Pachtman*, 424 U.S. 409, 420-28, 96 S.Ct. 984, 990-94, 47 L.Ed.2d 128 (1976) (prosecutor absolutely immune from liability for decision to initiate prosecution); *Pierson v. Ray*, 386 U.S. 547, 553-55, 87 S.Ct. 1213, 1217-18, 18 L.Ed.2d 288 (1967) (state municipal judge absolutely immune from prosecution under section 1981).

In a similar context, the Supreme Court has written that "even if one characterizes the immunity defense as a statutory deprivation, it would remain true that the state's interest in fashioning its own rules of tort law is paramount to any discernible federal interest, except perhaps an interest in protecting the individual citizen from state action that is wholly arbitrary or irrational." *Martinez v. California*, 444 U.S. 277, 282, 100 S.Ct. 553, 557, 62 L.Ed.2d 481 (1980). In *Martinez*, the court held that a California statute, which granted absolute immunity to public employees responsible for parole-release decisions, was not an unconstitutional deprivation of due process when applied to defeat a tort claim arising under state law.

Nor should *Parratt v. Taylor*, 451 U.S. 527, 101 S.Ct. 1908, 68 L.Ed.2d 420 (1981) be read to constrain a state's ability to establish its own substantive rules of law when such rules create no conflict with federal law. *See Ferri v. Ackerman*, 444 U.S. 193, 198, 100 S.Ct. 402, 406, 62 L.Ed.2d 355 (1979). In *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 432, 102 S.Ct. 1148, 1156, 71 L.Ed.2d 265 (1982), the court reiterated that "the state remains free to create substantive defenses or immunities for use in adjudication—or to eliminate its statutorily created causes of action altogether—just as it can amend or terminate its welfare or employment programs."

No authority has been called to my attention that supports the conclusion that a state's immunity statute must ineluctably lead to a denial of due process such that section 1983 must be expanded to encompass negligence actions. The absence of a particular state remedy cannot, without more, require that a federal remedy be provided.[4]

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[4] Were an absolute grant of immunity, precluding state tort suits, sufficient to establish a right to a federal remedy, a pedestrian negligently struck by a police car racing to apprehend a criminal, would be entitled to maintain a 1983 action in federal court if a state immunity statute shielded police from liability for negligent acts occurring in the course of duty. Yet, if the enactment of an

In terms of a procedural due process analysis, it then must be determined "what process is due" Davidson. The Fourth Circuit in *Daniels v. Williams*, 720 F.2d 792 (4th Cir. 1983) held that a state may plead sovereign immunity as an affirmative defense. In that case the plaintiff would have received procedural due process when and even though the state's affirmative defense was sustained. Here, even if we were to assume that the negligence of the defendants, Cannon and James, amounted to a "deprivation of liberty," consideration must be given to the state's strong interest in protecting its prison officials from liability.

Such decisions require an inherently delicate determination, a determination which would balance prison order and safety against an individual's traditional desire to obtain a monetary response for injury suffered through a negligent act. *Cf. Harlow v. Fitzgerald*, 457 U.S. 800, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982) (creating qualified immunity for public officials performing discretionary functions). Thus, in this instance, if the balance is struck in favor of the state as I suggest it must be, Davidson has had all the process which is his due. This being so, there is no requirement that Davidson be assured a cause of action against the state or the state's officers for arguably negligent conduct, let alone a 1983 action in federal court. This does not mean, of course, that Davidson may not pursue any claim that he may have against McMillan, the prisoner who actually attacked him.

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immunity statute by a state is deemed to result in a federal remedy by default, not only would the state's legitimate interest in fashioning rules of tort law be curtailed, but also state law would then determine the content of 1983 actions in federal court. This reasoning "would make the Fourteenth Amendment a font of tort law to be superimposed upon whatever systems may already be administered by the States." *Paul v. Davis*, 424 U.S. 693, 701, 96 S.Ct. 1155, 1160, 47 L.Ed.2d 405 (1976). I suggest that to allow a federal constitutional remedy in the circumstances presented here is not only contrary to the purposes of section 1983 but necessarily trivializes 1983 actions.

Accordingly, I suggest that those who advocate a federal constitutional remedy by default (where no state remedy is available) have failed to consider and to balance the state's interest against the interest asserted by the claimant. In failing to do so, they have also failed to recognize that a state may afford appropriate due process without that process necessarily resulting in a recovery for the claimant.[5] *See, e.g., Daniels v. Williams*, 720 F.2d 792 (4th Cir. 1983). In this case, therefore, it is evident to me that whether the majority's analysis is followed—an analysis and result which I believe to be wholly correct—or an *appropriate* due process analysis is developed—the conclusion we reach must necessarily be the same. Judgment must be entered for the defendants.

SEITZ, Circuit Judge, dissenting.

I part company with the majority because I read the Supreme Court's decision in *Parratt v. Taylor*, 451 U.S. 527, 101 S.Ct. 1908, 68 L.Ed.2d 420 (1981), to dictate a different result. In *Parratt*, the Court considered whether "mere negligence will support a claim for relief under § 1983 . . . ." *Id.* at 532, 101 S.Ct. at 1911. The polestar of its analysis was "the complex interplay of the Consti-

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[5] *Thibodeaux v. Bordelon*, 740 F.2d 329 (5th Cir. 1984) is not to the contrary. Admittedly, *Thibodeaux* does not adopt the majority's distinction between "liberty interests" and "property interests." However, in its procedural due process analysis, *Thibodeaux* affirmed the dismissal of the plaintiff's negligence action remitting him to his state law remedies. *Thibodeaux* does not address or discuss what result would obtain if *no remedy* were available in the Louisiana state courts. Nothing in *Thibodeaux* indicates that in such a situation the Fifth Circuit would then hold that the plaintiff had stated a federal cause of action under 1983. To the contrary, throughout its opinion, *Thibodeaux* cites the Fourth Circuit case of *Daniels v. Williams*, 720 F.2d 792 (4th Cir. 1983) with approval. It should be remembered that *Daniels* did not remit the plaintiff to a federal cause of action when his state claim was barred by the doctrine of sovereign immunity.

tution, statutes and facts" of the particular case. The Court eschewed "a single, general principle, however just that principle may be in the abstract . . . ." *Id.* at 531-32, 101 S.Ct. at 1911. Thus, the question presented here is not the abstract one of whether, as a general principle, negligence may support a § 1983 claim. Rather, the issue is whether plaintiff, under the facts of this case, has satisfied the specific requirements of § 1983.

Looking to the language of the Fourteenth Amendment and § 1983, the *Parratt* Court identified four elements which are necessary to any § 1983 claim purporting to be founded on a violation of the Due Process Clause of the Fourteenth Amendment.[1] First, the conduct complained of must have been committed by a person acting under color of state law. Second, an interest in life, liberty, or property must be implicated. Third, the conduct complained of must amount to a deprivation. And fourth, the state must have failed to provide due process of law. *Id.* at 535-37, 101 S.Ct. at 1912-14. The Court then applied this legal standard to the facts in *Parratt.*

The case before us is determined by the application of this four-part analysis. First, the defendants' actions in this case were clearly under color of state law. *See Monroe v. Pape*, 365 U.S. 167, 172-85, 81 S.Ct. 473, 476-83, 5 L.Ed.2d 492 (1961). Defendants do not argue otherwise.

Second, as the majority holds, plaintiff's claim falls within the scope of his Fourteenth Amendment liberty interest in personal security. *See Youngberg v. Romeo*, 457 U.S. 307, 102 S.Ct. 2452, 73 L.Ed.2d 28 (1982). A prison inmate retains his liberty interest except to the extent that it is "fundamentally inconsistent with imprisonment itself or incompatible with the objectives of incarceration." *Hudson v. Palmer*, —— U.S. ——, ——, 104 S.Ct.

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[1] This case does not call upon us to consider § 1983 claims founded on alleged violations of constitutional provisions other than the Due Process Clause.

3194, 3198, 82 L.Ed.2d 393 (1984). Plaintiff's interest in being free from assault was surely not inconsistent with his status as a prisoner or with any legitimate penological objective.

Third, the conduct complained of constitutes a deprivation. The Supreme Court held that the negligently caused loss of property in *Parratt* "[u]nquestionably . . . amounted to a deprivation." 451 U.S. at 536-37, 101 S.Ct. at 1913 (footnote omitted); *see Holman v. Hilton*, 712 F.2d 854, 856 (3d Cir. 1983) ("section 1983 affords a remedy for negligent deprivation"). I can think of no persuasive reason why a negligently caused loss of a liberty interest is any less of a deprivation.

Fourth, and finally, did the State of New Jersey provide due process of law? The state could not, of course, provide any predeprivation procedure. It has seen fit, however, to deny any postdeprivation remedy against defendants as well. Thus, we are not called upon to determine what would constitute adequate procedures in these circumstances. Furthermore, we need not consider the separate issue of what conduct might constitute a violation of substantive due process "even if undertaken with a full panoply of procedural protection" because it is "antithetical to fundamental notions of due process." *Parratt v. Taylor*, 451 U.S. at 545, 101 S.Ct. at 1918 (Blackmun, J., concurring). Since some procedural due process is due, when a person, acting under color of state law, deprives an individual of a liberty interest, the Due Process Clause of the Fourteenth Amendment has been violated in this case.[2] Therefore, plaintiff's claim is cognizable under § 1983.

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[2] In this case, the mere right to file an action is tantamount to no process at all since, under New Jersey's immunity statute, the action must be terminated prior to any proceedings on the merits. It is true that due process does not always require proceedings on the merits. For instance, "the state certainly accords due process when it terminates a claim for failure to comply with a reasonable procedural or evidentiary rule." *Logan v. Zimmerman Brush Co.*,

This conclusion does not implicate a significant increase in § 1983 actions founded on alleged violations of the Due Process Clause because, as a general matter, states do not bar postdeprivation actions against their employees. States remain free, under *Parratt*, to provide an adequate postdeprivation remedy for their employees' negligent deprivations of property and negate the possibility of a § 1983 claim based on the denial of procedural due process. The reasoning in *Parratt* suggests that the same is true in the liberty context. 451 U.S. at 537-44, 101 S.Ct. at 1913-17; *see Thibodeaux v. Bordelon*, 740 F.2d 329, 334-37 (5th Cir. 1984) ("no reason to differentiate between liberty interests and property interests" in the context of procedural due process) (Wisdom, J.). And, of course, that plaintiff "might not be able to recover under these remedies the full amount which he might receive in a § 1983 action is not . . . determinative of the adequacy of the state remedies." *Hudson v. Palmer*, —— U.S. at ——, 104 S.Ct. at 3204; *Parratt v. Taylor*, 451 U.S. at 543-44, 101 S.Ct. at 1916-17.

My analysis implicitly rejects the contention that a prisoner cannot succeed under § 1983 for a deprivation of his Due Process liberty interest in circumstances where the Eighth Amendment "deliberate indifference" standard would not be satisfied. *Parratt* mandates that this contention be rejected unless, under the Due Process Clause, prisoners' liberty interests are to be given less

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455 U.S. 422, 437, 102 S.Ct. 1148, 1158, 71 L.Ed.2d 265 (1982). But this state immunity statute denies any "opportunity for [a] hearing appropriate to the nature of the case." *Id.* at 428, 102 S.Ct. at 1153 (quoting *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313, 70 S.Ct. 652, 656, 94 L.Ed. 865 (1950)). Only a federally-recognized immunity justifies this result, otherwise "a state immunity defense . . . would transmute a basic guarantee into an illusory promise . . . ." *Martinez v. California*, 444 U.S. 277, 284 n. 8, 100 S.Ct. 553, 558 n. 8, 62 L.Ed.2d 481 (1980) (quoting *Hampton v. Chicago*, 484 F.2d 602, 607 (7th Cir. 1973), *cert. denied* 415 U.S. 917, 94 S.Ct. 1413, 39 L.Ed.2d 471 (1974)).

protection than their property interests. Furthermore, consistency does not require that the standards under the two provisions be the same. On the one hand, there is a constitutional violation whenever the Eighth Amendment "deliberate indifference" standard is satisfied, since the violation is the deliberate indifference itself. On the other hand, a negligent deprivation of a liberty interest amounts to a violation of procedural due process only where the state fails to provide adequate postdeprivation procedures, since for Due Process Clause purposes "the State's action is not complete until and unless it provides or refuses to provide a postdeprivation remedy." *Hudson v. Palmer*, —— U.S. at ——, 104 S.Ct. at 3204. In sum, the causes of action under the Eighth and Fourteenth Amendments are birds of entirely different feathers.

I disagree with the majority's holding essentially because it finds no deprivation in this case. It does so without quoting the essential language in *Parratt*, which holds that plaintiff's loss in that case "even though negligently caused, amounted to a deprivation." 451 U.S. at 536-37, 101 S.Ct. at 1913 (footnote omitted).

Justice Powell, concurring in the result in *Parratt*, "would not" have held, under the facts of that case, that "a negligent act . . . works a deprivation in the *constitutional sense*." *Id.* at 548, 101 S.Ct. at 1919. That he refused to join the majority opinion supports my reading of *Parratt*. Although there is much to be said for Justice Powell's opinion, which "would avoid trivializing the right of action provided in § 1983," we are not free to weigh the persuasiveness of his approach against that of the Court's and choose for ourselves which to apply.

Our court feels constrained to hold in this case that mere negligence does not constitute a deprivation, apparently because it equates two wholly different questions. The majority first notes that *Parratt* did not purport to announce a turnaround from the Supreme Court's prior position that traditional torts do not become constitutional violations simply because they are committed by state

officials. On this basis it then concludes that the *Parratt* Court could not have held that mere negligence amounts to a deprivation. Although it is, of course, true that the Supreme Court did not hold that mere negligence by a state official amounts to a constitutional tort cognizable under § 1983, it did hold that such negligence amounts to a deprivation. Therefore, if the other elements of a § 1983 claim purporting to be founded on a violation of the Due Process Clause of the Fourteenth Amendment are made out; i.e., conduct under color of state law, a life, liberty or property interest, and a lack of adequate due process; then the § 1983 claim is cognizable.

The majority focused on the abstract, general question, eschewed by the Supreme Court of whether mere negligence amounts to a constitutional violation cognizable under § 1983. Consequently, it failed to answer properly whether plaintiff has satisfied the specific requirements of the statute, particularly the "deprivation" requirement, as they were analyzed by the Supreme Court in *Parratt*. Plaintiff, in my view, has satisfied those requirements.

I would affirm.

GIBBONS, Circuit Judge, dissenting:

The question presented in this appeal is a narrow one: may a state, when it involuntarily commits persons to the custody of state agents, thereby depriving those persons of the capacity for flight, self defense, or calls for assistance, consistent with the fourteenth amendment relieve those agents of the duty to take reasonable care to prevent third parties from injuring them. No broader issue is presented, for we are not here dealing with the duty of care owed to persons at liberty. No narrower question is presented either, for regardless of the reasons for commitment—civil or criminal, pre-trial or post-trial—every involuntarily committed person is identically deprived of the ability to resort to self help against the third parties.

There was a time in our history when the government of the United States was so indifferent to the plight of persons involuntarily committed to custody by the states that it condoned hundreds of lynchings per year.[1] Among civilized persons in this twelfth decade of the fourteenth amendment, however, I would have hoped that a negative answer to the question presented would no longer be a matter of serious debate. Whatever a state may do in relieving its agents of the obligation to take reasonable care in performing other duties, no body politic calling itself humane should assert that the custodians of the involuntarily committed may be relieved of the duty to take reasonable care to prevent harm from befalling their charges.[2] Yet six judges of this court unfortunately are of the view that custodians may be relieved of that duty. Because I share a common humanity with the involuntarily committed, I dissent.

I.

The Injury

Robert Davidson, a former inmate of the New Jersey State Prison at Leesburg, suffered serious personal injuries when he was beaten and stabbed by another inmate. In a suit brought in the district court pursuant to 42 U.S.C. § 1983 (1982) he contended that the beating

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[1] *United States v. Harris*, 106 U.S. 629, 1 S.Ct. 601, 27 L.Ed. 290 (1882) (Federal antilynching law unconstitutional); J. Chadbourn, *Lynching and the Law* (1933); W. White, *Rope & Faggot* (1929); National Association for the Advancement of Colored People, *Thirty Years of Lynching in the United States 1889-1918* (1919); J. Cutler, *Lynch-Law; An Investigation of the History of Lynching in the United States* (1969).

[2] *But see Union County Jail Inmates v. DiBuono*, 713 F.2d 984, 718 F.2d 1247 (3d Cir. 1983) (pretrial detainees and sentenced inmates may be confined in conditions comparing unfavorably with those permitted by federal laws regulating the confinement of animals).

and stabbing occurred because two state prison officers, Joseph Cannon and Robert James, failed to take reasonable care to prevent the incident. The trial court found that Cannon and James did fail to take rasonable care to prevent the incident, and awarded $2,000 in compensatory damages. This court holds unanimously that the district court's findings of fact are not clearly erroneous Fed.R.Civ.P. 52(a). Therefore, for purposes of this appeal we agree that the state agents to whom the state entrusted custody of Davidson failed to take reasonable care to prevent a third party from inflicting harm on him.

II.

The New Jersey Scheme for Relieving its Agents of Responsibility

An appreciation of the New Jersey scheme for relieving its agents of responsibility requires an examination of developments in another state. In *Muskopf v. Corning Hospital District*, 55 Cal.2d 211, 359 P.2d 457, 11 Cal. Rptr. 89 (1961) Justice Traynor, in a typically enlightened opinion, held that the doctrine of governmental immunity in tort had outlived its usefulness. While at that time governmental entities in California and elsewhere claimed sovereign immunity from *respondeat superior* liability for the acts of their agents and servants, those agents and servants were, like the rest of us, subject to common law remedies except to the extent that judicial, legislative or executive officer immunity doctrines held otherwise. In reaction to Justice Traynor's opinion the California legislature passed to two-year moratorium on the application of the *Muskopf* holding while the State Law Review Commission studied the matter further.[3]

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[3] 1961 Cal.Stat., c. 1404, p. 3209, *codified at* Cal.Civ.Code § 22.3, Cal.Gov't Code § 9611 (West 1982) (repealed 1979).

Justice Traynor would simply have made governmental agencies liable on a traditional *respondeat superior* basis, leaving in place the centuries old common law individual liability in tort of state agents. The Commission proposed a radically different approach. Accepting the proposition that the state could be liable in tort on a *respondeat superior* basis, it proposed, for the first time, to enlarge the areas in which state agents would enjoy personal immunity, and to make the state's immunity coextensive.[4] The result of the Commission's efforts was the California Tort Claims Act of 1963.[5]

Several years later when the New Jersey legislature, observing the New Jersey Supreme Court's discomfort with sovereign immunity in cases such as *B.W. King, Inc. v. West New York*, 49 N.J. 318, 325, 230 A.2d 133, 137 (1967), considered the problem of governmental liability, it adopted the California approach, which recognized that governmental entities were subject to *respondeat superior* liability, but conferred on state agents in many instances an immunity from common law actions which they had never before in history enjoyed.[6] The purpose of the legislature to contract common law liability of state agents is clear, for it declared "that while a private entrepreneur may readily be held liable for negligence within the chosen ambit of his activity, the area

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[4] *Cf. Owen v. City of Independence*, 445 U.S. 622, 100 S.Ct. 1398, 63 L.Ed.2d 673 (1980) (Government entity does not enjoy immunities of its agents).

[5] Cal.Gov't Code § 810 *et seq.* (West 1982 & Supp. 1984).

[6] The New Jersey courts have repeatedly acknowledged the California provenience of the New Jersey Tort Claims Act. *See, e.g., Birchwood Lakes Colony Club, Inc. v. Borough of Medford Lakes*, 90 N.J. 582, 449 A.2d 472 (1982); *Rivera v. Gerner*, 89 N.J. 526, 446 A.2d 508 (1982); *Brown v. Brown*, 86 N.J. 565, 432 A.2d 493 (1981); *Costa v. Josey*, 83 N.J. 49, 415 A.2d 337 (1980); *Kolitch v. Lindedahl*, 193 N.J.Super. 540, 475 A.2d 86 (App.Div. 1984); *Speziale v. Newark Housing Authority*, 193 N.J.Super. 413, 474 A.2d 1085 (App.Div. 1984).

within which government has the power to act for the public good is almost without limit and therefore government should not have the duty to do everything that might be done." N.J.Stat.Ann. § 59:1-2 (West 1982). The declaration of purpose refers not to government *liability* as was the case under common law sovereign immunity, but rather to government *duty*. That change in focus from the absence of state *liability* to the absence of state *duty* is the central feature of the Act. It provides that "[a] public entity is not liable for an injury resulting from an act or omission of a public employee where the public employee is not liable." *Id.* § 59:2-2(b). Like its California counterpart, the New Jersey Act then provides a series of absolute statutory immunities which eliminate common law remedies historically available against such employees.[7]

The Tort Claims Act provides that the Attorney General must defend any action brought against a present or former state employee. *Id.* § 59:10A-1. It provides, moreover, that the State shall provide indemnification to present and former employees except for punitive or exemplary damages. *Id.* § 59:10-1. Thus under the Tort Claims Act the state's indemnification and defense undertaking, and the broad provisions for official immunity, are directly related. The state has undertaken to provide defense of claim and liability insurance for its employees, as a self-insurer, at public expense. Simultaneously, however, the state has attempted to protect its fisc, by conferring on its employees and retaining for itself absolute immunity from recovery for certain injuries. And, as is apparent from the Attorney General's appearance in this appeal, New Jersey construes its statutory defense and indemnification obligations as extending to the defense

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[7] The Act makes a distinction between retrospective remedies at law and prospective remedies in equity. N.J.Stat.Ann. § 59:1-4 (West 1982). Obviously a prospective remedy would be of no use to Davidson. *See Ex Parte Young*, 209 U.S. 123, 28 S.Ct. 441, 52 L.Ed. 714 (1908).

of actions brought pursuant to 42 U.S.C. § 1983. The state is the real party in interest.

The atmosphere in which the New Jersey Tort Claims Act was considered by the legislature was hardly conducive to dispassionate reflection upon the appropriate balance between the needs of society and the accountability of state agents. At the time the Act was passed, lawsuits still were pending against New Jersey officials growing out of what the plaintiffs in those lawsuits contended were either excessive or inadequate reactions to the civil disturbances in 1967. In that atmosphere, perhaps not surprisingly, the legislature conferred several rather radical immunities on law enforcement officials and on custodians of involuntarily committed persons.

A number of New Jersey's immunity provisions bear upon the duty owed by custodians toward persons whom the state has placed in their charge. Perhaps the broadest is the provision that "[a] public entity is not liable for any injury caused . . . by failing to enforce any law." N.J.Stat.Ann. § 59:2-4 (West 1982). Moreover "[n]either a public entity nor a public employee is liable for failure to provide police protection service or, if police protection service is provided, for failure to provide sufficient police protection service." *Id.* § 59:5-4. Thus New Jersey public employees appear to be totally relieved of the duty to prevent even a lynching, for example. The Act also provides, that "[n]either a public entity nor a public employee is liable for failure to provide a medical facility or mental institution, or if such facility or institution is provided, for failure to provide sufficient equipment, personnel or facilities in a mental institution or medical facility." * *Id.* § 59:6-2. When a person has been confined for mental illness (which by definition includes mental deficiency) "[n]either a public entity nor a public employee is liable for . . . (b) an injury caused by any

* *Cf. Youngberg v. Romeo*, 457 U.S. 307, 102 S.Ct. 2452, 73 L.Ed.2d 28 (1982); *Rennie v. Klein*, 720 F.2d 266 (3d Cir. 1983).

person who has been confined . . . upon any other person so confined." *Id.* § 59:6-7. Finally, "[n]either a public entity nor a public employee is liable for . . . (b) any injury caused by: . . . (4) a prisoner to any other prisoner." *Id.* 59:5-2b(4). Thus the New Jersey Act treats civilly committed mental patients, and both pretrial detainees and convicted prisoners, in the same manner. It has conferred on the custodians a total immunity from any claim that they failed to exercise *any* level of care to prevent harm from fellow inmates. Moreover by eliminating liability for failure to provide police protection, New Jersey has relieved non-custodians, as well, of any obligation to prevent such harm.[9]

Under the New Jersey immunity scheme the state agent's state of mind is irrelevant. Immunity attaches whether the immunized agent acted or failed to act intentionally, or in reckless disregard of the consequences, or without reasonable care. Thus, under New Jersey law,

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[9] Other immunity provisions in the Tort Claims Act, not significant for the duty of care owed to persons involuntarily confined, relate to 42 U.S.C. § 1983 in other respects. These include N.J. Stat.Ann. §§ 59:2-5 and 59:3-6 (West 1982) (no liability for an injury caused by issuance, denial, suspension or revocation of, or refusal to issue, deny, suspend or revoke, any permit, license, certificate, approval, order, or similar authorization); *id.* §§ 59:2-8 and 59:3-13 (no liability for injuries caused by the termination or reduction of benefits under a public assistance program); *id.* § 59:3-2 (no liability for an injury resulting from exercise of judgment or discretion); *id.* § 59:3-3 (no liability for good faith action in execution or enforcement of any law); *id.* § 59:3-4 (no liability for injury caused by action under apparent authority of a law that is unconstitutional, invalid or inapplicable); *id.* § 59:3-5 (no liability for any injury caused by failure to enforce any law); *id.* § 59:3-8 (no liability for injury caused by initiation or prosecution of any judicial or administrative proceeding); *id.* § 59:3-9 (no liability for entry upon any property); *id.* § 59:3-10 (no liability for misrepresentation made in scope of employment); *id.* § 59:5-1 (no liability for failure to provide facilities in a prison or other correction facility); *id.* § 59:5-4 (no liability for failure to provide police protection).

Davidson could not recover from Cannon or James, or from the state, for the injuries he received at the hands of his fellow inmate under any conceivable set of circumstances. And in this respect the outcome would be the same under New Jersey law had Davidson been a patient in a New Jersey mental institution.

III.

The Federal Liberty Interest

Recognizing that it is beyond the power of the legislature, in California or New Jersey, to relieve state agents acting under color of those states' laws, of duties imposed by the constitution, the Attorney General of New Jersey urges that Davidson has no interest protected by the constitution or laws of the United States. Any right that he had to personal security from harm by fellow prisoners ended, according to the state, when Davidson was involuntarily committed to the custody of those state agents upon whom New Jersey conferred immunity.

For a brief period in 1976 the Supreme Court appeared to be flirting with the dangerous notion that the liberty clause of the fourteenth amendment had no federal substantive content, except perhaps, such as was set forth explicitly in other provisions of the constitution. One example of that dangerous flirtation is *Paul v. Davis*, 424 U.S. 693, 710, 96 S.Ct. 1155, 1164, 47 L.Ed.2d 405 (1976), effectively overruling the Court's holding in *Wisconsin v. Constantineau*, 400 U.S. 433, 91 S.Ct. 507, 27 L.Ed.2d 515 (1971) that there is a federal substantive liberty interest in one's reputation. According to *Paul v. Davis*, the due process clause protects the personal liberty to maintain a good repute only if a state positive law creates such an interest in the first place. Other examples of the Court's tendency toward sapping the liberty clause of federal substantive content were *Meachum v. Fano*, 427 U.S. 215, 228, 96 S.Ct. 2532, 2540, 49 L.Ed.2d 451 (1976) and *Montanye v. Haymes*, 427 U.S. 236, 243, 96

S.Ct. 2543, 2547, 49 L.Ed.2d 466 (1976), holding that a state prisoner had only such right to be free from transfer to more onerous conditions of confinement as could be found in state positive law. The tendency in those cases was to equate for purposes of analysis, the separate terms "life, liberty, or property" in the fourteenth amendment. Indeed the Court majority in those rather ominous opinions made essentially the same analyses with respect to due process protection of claimed personal liberty interests as in modern times it customarily makes with respect to due process protections of property. *See, e.g., Bishop v. Wood*, 426 U.S. 341, 96 S.Ct. 2074, 48 L.Ed.2d 684 (1976) (state law contract right required before employment is protected by due process clause); *Goss v. Lopez*, 419 U.S. 565, 95 S.Ct. 729, 42 L.Ed.2d 725 (1975) (state statutory right to attend school cannot be terminated without due process); *Board of Regents v. Roth*, 408 U.S. 564, 92 S.Ct. 2701, 33 L.Ed.2d 548 (1972) (state law contract right required before employment is protected by due process clause); *Goldberg v. Kelly*, 397 U.S. 254, 90 S.Ct. 1011, 25 L.Ed.2d 287 (1970) (federal statutory entitlement cannot be terminated without due process). *Cf., e.g., Lochner v. New York*, 198 U.S. 45, 25 S.Ct. 539, 49 L.Ed. 937 (1905) (state law cannot intrude upon federally protected right to contract). The Court's recognition that property rights are always creatures of some sovereign's positive law, and thus that the term "property" in the fourteenth amendment must always have some positive law content—usually state law—was entirely sound. But it was one thing to hold that a property interest did not exist aside from some state positive law which created it, and quite another to hold that the right to life or to liberty was equally dependent on state positive law. That mode of analysis would enable the state legislatures to deprive the life and liberty clauses of the fourteenth amendment of any real meaning. Justice Stevens saw in the Court's mode of analysis the danger that positivism would degenerate into totalitarianism,

and sounded the alarm in his dissent in *Meachum v. Fano*:

> If man were a creature of the State, the analysis would be correct. But neither the Bill of Rights nor the laws of sovereign States create the liberty which the Due Process Clause protects. The relevant constitutional provisions are limitations on the power of the sovereign to infringe on the liberty of the citizen. The relevant state laws either create property rights, or they curtail the freedom of the citizen who must live in an ordered society. Of course, law is essential to the exercise and enjoyment of individual liberty in a complex society. But it is not the source of liberty, and surely not the exclusive source.
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> I had thought it self-evident that all men were endowed by their Creator with liberty as one of the cardinal unalienable rights. It is that basic freedom which the Due Process Clause protects, rather than the particular rights or privileges conferred by specific laws or regulations.

427 U.S. at 230, 96 S.Ct. at 2541 (Stevens, J., dissenting).

Whether because of Justice Stevens' warning against statism or for other reasons, the Court in 1977 reconsidered its drift in that direction. In *Ingraham v. Wright*, 430 U.S. 651, 673, 97 S.Ct. 1401, 1413, 51 L.Ed.2d 711 (1977) it held that "[a]mong the historic liberties . . . protected [by the due process clause] was a right to be free from, and to obtain judicial relief for, unjustified intrusions on personal security." The holding in *Ingraham v. Wright* was a reiteration of the position taken by the Court prior to its 1976 flirtation with statism in matters of personal liberty. Indeed the court in *Ingraham v. Wright* relied on its holding in *Rochin v. California*, 342 U.S. 165, 72 S.Ct. 205, 96 L.Ed. 183 (1952) that the state violated a defendant's right to personal security by subjecting him, involuntarily, to a stom-

ach pump. 430 U.S. at 673-74, 97 S.Ct. at 1413-14. The holding in *Ingraham v. Wright* confirmed the soundness of this court's opinion in *Curtis v. Everette*, 489 F.2d 516, 518 (3d Cir.1973) *cert. denied*, 416 U.S. 995, 94 S.Ct. 2409, 40 L.Ed.2d 774 (1974) that the fourteenth amendment was violated when prison guards permitted an assault on the plaintiff by a fellow prisoner, for our opinion also relied on *Rochin v. California*.

A year after *Ingraham v. Wright* the Court in *Addington v. Texas*, 441 U.S. 418, 99 S.Ct. 1804, 60 L.Ed.2d 323 (1979) reconfirmed that the fourteenth amendment, entirely aside from state positive law, recognized the personal liberty to be free from constraint, holding that despite the state's *parens patriae* powers in providing care for persons unable to care for themselves, the state could not involuntarily commit those persons on proof of their condition no more substantial than a preponderance of the evidence.[10]

The right of personal security at issue in *Ingraham v. Wright* was that of a student who was at liberty except for the mild coercion of the state's school attendance law. In *Addington v. Texas* the person alleged to be mentally ill was at liberty until the state attempted his involuntary confinement. Nevertheless the Court's reliance in *Ingraham v. Wright* on *Rochin v. California*, which involved a pretrial detainee, suggested that it would not distinguish, for purposes of the existence of the right to personal security, between persons at liberty and persons confined. This was confirmed a year after *Addington v. Texas* when in *Vitek v. Jones*, 445 U.S. 480, 490-91, 100 S.Ct. 1254, 1262-63, 63 L.Ed.2d 552 (1980) the Court

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[10] *Addington v. Texas* reconfirmed the authority of *O'Connor v. Donaldson*, 422 U.S. 563, 95 S.Ct. 2486, 45 L.Ed.2d 396 (1975); *Jackson v. Indiana*, 406 U.S. 715, 92 S.Ct. 1845, 32 L.Ed.2d 435 (1972); *Humphrey v. Cady*, 405 U.S. 504, 92 S.Ct. 1048, 31 L.Ed.2d 394 (1972); *In re Gault*, 387 U.S. 1, 87 S.Ct. 1428, 18 L.Ed.2d 527 (1967) and *Specht v. Patterson*, 386 U.S. 605, 87 S.Ct. 1209, 18 L.Ed.2d 326 (1967).

held that even a convicted prisoner had a federally protected liberty interest, entirely apart from state positive law, in freedom from confinement in a mental institution.

Still more recently in *Youngberg v. Romeo*, 457 U.S. 307, 102 S.Ct. 2452, 73 L.Ed.2d 28 (1982) the Court strongly reiterated that all involuntarily committed persons, entirely aside from state positive law, retained a federally protected interest in personal safety. *Id.* at 315-16, 102 S.Ct. at 2458. The question in Judge Sloviter's opinion from Justice Powell's opinion of the Court in *Youngberg v. Romeo* establishes unequivocally that the right to be confined only in safe conditions applies equally to all persons whom the state commits involuntarily, regardless of the purpose of the confinement.

All the judges participating in this appeal, albeit with varying degrees of enthusiasm, join in rejecting New Jersey's contention that Davidson had no constitutionally protected right to personal safety while he was confined.[11] Convicted prisoners, pretrial detainees, and the civilly committed all have that same right.[12]

IV.

The Absence of a State of Mind Requirement in Section 1983

Section 5 of the fourteenth amendment authorizes Congress to enforce its provisions by appropriate legislation. Congress might have left the enforcement of the amendment primarily to the Supreme Court exercising supervision over the courts of the states. Instead, even before its effective date, Congress passed for the first time a

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[11] Judge Garth's separate opinion is too sophisticated for my comprehension but since he joins in Judge Sloviter's opinion I assume that he approves the holding in Part III thereof that Davidson has a constitutionally protected right to personal safety while confined.

[12] In this respect New Jersey is consistent. It *denies* any duty to protect the safety of any of them.

statute of general application implementing the first clause in article III section 2 of the Constitution, authorizing the lower federal courts to exercise jurisdiction in cases arising under the Constitution and laws of the United States.[13] When, following ratification of the amendment, Congress reenacted parts of the earlier statute, it used the broadest conceivable language, providing that "any person who . . . shall subject, or cause to be subjected, any person . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution of the United States, shall, any such law, statute, ordinance, regulation, custom or usage of the State to the contrary notwithstanding, be liable to the party injured in any action at law, suit in equity, or other proper proceeding for redress. . . ."[14] This statute, codified at 42 U.S.C. § 1983, still contains the sweeping language of the 1871 Congress.

When the 1871 Congress acted, the federal courts had little prior experience with federal question jurisdiction. The only previous jurisdictional statute of any moment in that respect was that chartering the Second Bank of the United States, which had afforded the Marshall Court its sole opportunity to construe the first clause in article III section 2. In *Osborn v. United States Bank*, 22 U.S. (9 Wheat.) 326, 6 L.Ed. 204 (1824) the Court held that Congress could confer on the lower federal courts federal question subject matter jurisdiction over any case in which was presented a question over which, had the case arisen in a state court, the Supreme Court would have potential appellate jurisdiction. It is reasonable to conclude that the sweeping language of the 1871 Civil Rights Act was intended to implement article III section 2, with respect to matters covered by the fourteenth amendment, to the full extent permitted under *Osborn*. Moreover, at the time of its enactment, federal equity practice was

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[13] Act of April 9, 1866, ch. 31, § 3, 14 Stat. 27.

[14] Act of April 20, 1871, ch. 22, § 1, 17 Stat. 13.

nationally uniform. On the law side, however, the federal courts under the Process Act [15] borrowed the practice, as of the date of each state's admission to the Union, of the states in which they sat. Thus one may be reasonably certain that in 1871 when Congress used the language "any action at law" it was fully cognizant of the fact that government agents had always been subject to the full range of common law remedies, many of which had no state of mind requirement, and that in the future, persons acting under color of state law would be subject to that same full range of common law remedies in the federal courts.

The Civil Rights Act of 1871 was, of course, anesthetized by the Court following the constitutional settlement of 1877.[16] So deep was the sleep that a leading expert on practice in the federal courts writing in 1925 did not even include that Act in a listing of statutes providing exceptions to the jurisdictional amount requirement. *See*, Dobie, *Jurisdictional Amount in the United States District Court*, 38 Harv.L.Rev. 733, 738 (1925). The Act remained dormant until the late 1930's. When it re-emerged, the initial cases which placed any significance on the Act involved intentional action of a rather extreme sort.[17] Because the early cases after the statute was rediscovered involved conduct that was not only intentional, but also specifically endorsed by state law, it was not until some years after the Federal Rules of Civil

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[15] Act of May 8, 1792, ch. 36, § 2, 7 Stat. 275, 276. *See*, *Wayman v. Southard*, 23 U.S. (10 Wheat.) 1, 6 L.Ed. 253 (1825) (changes in state procedural law inapplicable in actions at law in a federal court). *Cf.* Act of June 1, 1872, ch. 255, 17 Stat. 196.

[16] The anesthesia was administered principally in *Carter v. Greenhow*, 114 U.S. 317, 5 S.Ct. 928, 29 L.Ed. 202 (1884), *Holt v. Indiana Manufacturing Co.*, 176 U.S. 68, 20 S.Ct. 272, 44 L.Ed. 374 (1900) and *Barney v. City of New York*, 193 U.S. 430, 24 S.Ct. 502, 48 L.Ed. 737 (1904).

[17] *Hague v. C.I.O.*, 307 U.S. 496, 59 S.Ct. 954, 83 L.Ed. 1423 (1939) is the leading example.

Procedure had supplanted common law remedies in the federal courts that the Supreme Court addressed the question whether, for the first time, a state of mind requirement should be read into the sweeping language of section 1983. In *Monroe v. Pape*, 365 U.S. 167, 81 S.Ct. 473, 5 L.Ed.2d 492 (1961) the Court, for the first time after the post-reconstruction era, examined with any degree of consciousness the congressional intention reflected in the 1871 Act.[18] Even Justice Frankfurter, who never fully reconciled himself to the Warren Court's disassociation from the constitutional settlement of 1877, acknowledged that a specific intent requirement could not be read into section 1 of the Act, although the criminal counterpart originating in the same statute had been so construed. In *Monroe*, he wrote:

> If the courts are to enforce § [1983], it is an unhappy form of judicial disapproval to surround it with doctrines which partially and unequally obstruct its operation. Specific intent in the context of the section would cause such embarrassment without countervailing justification. Petitioners' allegations that respondents in fact did the acts which constituted violations of constitutional rights are sufficient.

365 U.S. at 207-08, 81 S.Ct. at 495 (Frankfurter, J., dissenting in part). Justice Frankfurter's dissent focused, instead, on the absence of a constitutional violation because the actions of the defendants were illegal under state law.[19] On that issue Justice Frankfurter stood

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[18] The examination was less thorough then it should have been. *Compare, Monroe v. Pape*, 365 U.S. 167, 81 S.Ct. 473, 5 L.Ed.2d 492 (1961) *with Monell v. Department of Social Services of the City of New York*, 436 U.S. 658, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978).

[19] There are striking similarities between Judge Sloviter's opinion and Justice Frankfurter's *Monroe v. Pape* dissent. Judge Sloviter does not go so far, however, as to suggest as Justice

alone. The Court was unanimously of the view, however, that no specific intent requirement could legitimately be written into section 1983 by judicial usurpation of the legislative function. If section 1983 was to reemerge from the closet in which it had been hidden by the post-reconstruction Court, it would reemerge as written. In the words of Justice Douglas, section 1983 "should be read against the background of tort liability that makes a man responsible for the natural consequences of his actions." 365 U.S. at 187, 81 S.Ct. at 484.

The decision in *Monroe v. Pape* was not greeted with universal enthusiasm, even among article III judges.[20] Despite *Monroe v. Pape's* clarity on the state of mind issue, litigants frequently attempted to convince lower federal courts to judicially write a state of mind requirement into section 1983. One such attempt was made in this court when the defendants urged that the fact that a policeman defendant was motivated by personal animosity against the plaintiff sufficed to place his acts outside the scope of section 1983. That contention was rejected in *Basista v. Weir*, 340 F.2d 74 (3d Cir.1965) by Judge Biggs, who unlike many of his contemporaries and successors, was an enthusiastic protector of civil rights.[21] His opinion stated:

Frankfurther urged that *Barney v. City of New York*, 193 U.S. 430, 24 S.Ct. 502, 48 L.Ed. 737 (1904) which had been cast in doubt by *Home Tel. & Tel. Co. v. Los Angeles*, 227 U.S. 278, 33 S.Ct. 312, 57 L.Ed. 510 (1913), and overruled in *United States v. Raines*, 362 U.S. 17, 80 S.Ct. 519, 4 L.Ed.2d 524 (1960), should be reestablished. This Court is still unanimously of the view that the legality or illegality of a defendant's action under state law is not determinative for purposes of section 1983 or the fourteenth amendment.

[20] *See, e.g.*, Aldisert, *Judicial Expansion of Federal Jurisdiction: A Federal Judge's Thoughts on Section 1983, Comity and the Federal Caseload*, 1973 Law and Social Order 557 (1973).

[21] *See, e.g., Picking v. Pennsylvania R. Co.*, 151 F.2d 240 (3d Cir. 1945); *Hague v. C.I.O.*, 101 F.2d 774 (3d Cir.), *aff'd in part and modified in part*, 307 U.S. 496, 59 S.Ct. 954, 83 L.Ed. 1423 (1939).

> While a specific intent to deprive a person of his constitutional rights is required under criminal sections of the Civil Rights Acts, 18 U.S.C. §§ 241, 242, neither specific intent, nor purpose to deprive an individual of his civil rights is a prerequisite to civil liability under the civil provisions of the Civil Rights Act.

Id. at 81. That, of course, was precisely what the Supreme Court had held unanimously in *Monroe v. Pape*, a case on which Judge Biggs expressly relied. *Id. Monroe v. Pape* and *Basista v. Weir* required no more than proof of action under color of state authority, which is in this case conceded. Unlike Judge Sloviter's sophistical effort to find, in the several opinions written in *Monroe v. Pape*, something which is not there, Judge Biggs' treatment of that case is consistent with the position taken by *all* the Justices on the critical issue in that case—namely that only the *state* could violate the Constitution. The language of Justic Harlan quoted by Judge Sloviter, p. 823, refers to that issue—the identity of the actor—not to any state of mind requirement.

Because not all lower court federal judges shared Judge Biggs' admirable enthusiasm for holding accountable all persons acting under color of state authority, it was not surprising that efforts to have the Court read a state of mind requirement into section 1983 would persist. Those efforts, as Judge Sloviter acknowledges, produced "no discernable thread." P. 823. Resistance to accountability by state officials in federal courts for their actions taken under color of state law did not slacken as the personnel of the Supreme Court changed during the 1970's, and several times it appeared that the *Monroe v. Pape* interpretation of section 1983 might be reconsidered. As Judge Sloviter acknowledges, the Court in *Procunier v. Navarette*, 434 U.S. 555, 559 n. 6, 98 S.Ct. 855, 858 n. 6, 55 L.Ed.2d 24 (1978) granted certiorari to consider whether a state of mind requirement should

be read into that section, but the case was decided on an unrelated ground.

When the Fifth Circuit Court of Appeals held in *McCollan v. Tate*, 575 F.2d 509 (5th Cir.1978) that a plaintiff should have a claim presented to the jury that the defendant sheriff had failed to take reasonable care to prevent his deputies from violating plaintiff's constitutional rights, the Court once again considered the section 1983 state of mind question. Justice Rehnquist wrote for the Court.

> Having been around this track once before in *Procunier, supra*, we have come to the conclusion that the question whether an allegation of simple negligence is sufficient to state a cause of action under § 1983 is more elusive than it appears at first blush. It may well not be susceptible of a uniform answer across the entire spectrum of conceivable constitutional violations which might be the subject of a § 1983 action. In any event, before the relationship between the defendant's state of mind and his liability under § 1983 can be meaningfully explored, it is necessary to isolate the precise additional violation with which he is charged.

Baker v. McCollan, 443 U.S. 137, 139-40, 99 S.Ct. 2689, 2692, 61 L.Ed.2d 433 (1979). The deprivation alleged in *Baker v. McCollan* was the detention, pursuant to a valid arrest warrant, of the wrong party. The Court held that the plaintiff had shown no invasion of any federally protected right, and thus once again declined to overrule the unanimous holding in *Monroe v. Pape* that section 1983 includes no state of mind requirement. Justice Rehnquist's admonition, however, that the answer to the question whether failure to exercise reasonable care to avoid or prevent constitutional violations "may not be susceptible of a uniform answer across the entire spectrum of constitutional violations" shows his awareness of the need to focus upon the nature of the interest being invaded—

either liberty or property—and upon the extent to which actions by the state may have made it impossible for the victim to have avoided the invasion by action of his own.

It should be noted that in *Baker v. McCollan* the Court decided a constitutional law issue, holding that the fourth amendment was not violated by an inadvertent arrest and detention of the wrong defendant pursuant to a valid warrant. A construction of section 1983 which would have read into it a state of mind requirement higher than the departure from reasonable care would have permitted the Court to avoid the decisions of that constitutional law question. *See Hogans v. Lavine*, 415 U.S. 528, 537-43, 94 S.Ct. 1372, 1379-82, 39 L.Ed.2d 577 (1974). The Court could have held that assuming, arguendo, a fourth amendment violation had occurred as a result of the failure to take reasonable care to avoid it, Congress intended that its post-occurrence vindication could only take place in a state court, with review in the Supreme Court under 28 U.S.C. § 1257. Thus in reaching the constitutional issue the *Baker v. McCollan* Court then made a conscious albeit implicit decision that it would not reconsider the *Monroe v. Pape* interpretation of section 1983.

Judge Sloviter states that Justice Rehnquist's distinction between the state of mind required by section 1983 and the state of mind required by the constitution is "enigmatic." P. 822, n. 3. There is no enigma. Justice Rehnquist was well aware, just as the members of this court are well aware, that some violations of the Constitution plainly do require a state of mind—infliction of punishment in violation of the eight amendment, for example. Others plainly do not—violations of the establishment clause of the first amendment, for example. Thus the description of *Baker v. McCollan* as "enigmatic" is no more than an unwarranted effort to disregard the Supreme Court's unadorned refusal in that case to overrule the interpretation of section 1983 which in *Monroe v. Pape* it had unanimously adopted.

Shortly after *Baker v. McCollan* was decided the Supreme Court in *Martinez v. California*, 444 U.S. 277, 100 S.Ct. 553, 62 L.Ed.2d 481 (1980) considered for the first time a provision of the California Tort Claims Act, on which New Jersey's Act is modeled. The section in question, the equivalent of which is N.J.Stat.Ann. § 59:5-2 (West 1982), provided that "[n]either a public entity nor a public employee is liable for: (a) Any injury resulting from determining whether to parole or release a prisoner . . . ." Cal.Gov't Code Ann. § 845.8(a) (West 1982). Plaintiffs sought recovery in a California state court for the death of a fifteen year old who had been murdered by a sex offender released on parole five months earlier, allegedly as a result of the negligence of the parole officials. The plaintiffs asserted a claim under section 1983, which the California court rejected. On appeal, the Supreme Court affirmed. Justice Stevens wrote:

> Although the decision to release Thomas from prison was action by the State, the action of Thomas five months later cannot be fairly characterized as state action. Regardless of whether, as a matter of state tort law, the parole board could be said either to have had a "duty" to avoid harm to his victim or to have proximately caused her death, see *Grimm v. Arizona Bd. of Pardons and Paroles*, 115 Ariz. 260, 564 P.2d 1227 (1977); *Palsgraf v. Long Island R. Co.*, 248 N.Y. 339, 162 N.E. 99 (1928), we hold that taking these particular allegations as true, appellees did not "deprive" appellants' decedent of life within the meaning of the Fourteenth Amendment.
>
> Her life was taken by the parolee five months after his release. He was in no sense an agent of the parole board. Cf. *Scheuer v. Rhodes*, 416 U.S. 232 [94 S.Ct. 1683, 40 L.Ed.2d 90 (1974)]. Further, the parole board was not aware that appellants' decedent, as distinguished from the public at large, faced any special danger. We need not and do not

> decide that a parole officer could never be deemed to "deprive" someone of life by action taken in connection with the release of a prisoner on parole. But we do hold that at least under the particular circumstances of this parole decision, appellants' decedent's death is too remote a consequence of the parole officers' action to hold them responsible under the federal civil rights law. Although a § 1983 claim has been described as "a species of tort liability," *Imbler v. Pachtman*, 424 U.S. 409, 417 [96 S.Ct. 984, 988, 47 L.Ed.2d 128 (1976)], it is perfectly clear that not every injury in which a state official has played some part is actionable under that statute.

444 U.S. at 284-85, 100 S.Ct. at 559 (footnotes omitted).

The unanimous decision in *Martinez v. California* is significant for this case in two respects. First, it confirms that neither California nor New Jersey can confer an immunity which must be recognized in a section 1983 action, even in a state court. The Court recognizes explicitly that because there is concurrent jurisdiction over section 1983 actions, state courts must entertain them.[22] 444 U.S. at 283 n. 7, 100 S.Ct. at 558 n. 7, citing *Testa v. Katt*, 330 U.S. 386, 391, 67 S.Ct. 810, 813, 91 L.Ed. 967 (1947). Second, the opinion, in determining the liability of the parole officers for their *own* actions as distinct from the actions of the murderer, makes a conventional tort law proximate cause analysis. There is no suggestion in *Martinez v. California* that had proximate cause standards been satisfied, the state employees would have been excused from the duty to take reasonable care to prevent foreseeable harm. Indeed the clear implication of Justice Stevens' opinion is that had proximate cause been estab-

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[22] Thus despite any possible implication to the contrary in Judge Garth's opinion, the outcome of this case must be the same whether Davidson proceeded in a federal or a state forum. The state could eliminate causes of action based on state law, but must entertain section 1983 causes of action.

lished between the parole board's negligence and the death of the victim section 1983 would provide a remedy.

The issue of a state of mind requirement in section 1983 was next addressed in *Parratt v. Taylor*, 451 U.S. 527, 101 S.Ct. 1908, 68 L.Ed.2d 420 (1981). Unlike the federally protected liberty interest in personal security involved in *Baker v. McCollan* and in this case, *Parratt* involved a state law property interest. The plaintiff, an inmate of the Nebraska Penal and Correctional Complex, proceeding *pro se* convinced the district court that state officers had negligently deprived him of property. The Court of Appeals for the Eighth Circuit affirmed without opinion. 620 F.2d 307 (1980). Nebraska petitioned for certiorari and the first question presented in its petition is "[w]hether simple negligence, if proven, may form the basis of a judgment under 42 U.S.C. § 1983." *Petition for cert. granted*, 449 U.S. 917, 101 S.Ct. 315, 66 L.Ed.2d 145, filed May 1, 1980 at 2. Nebraska's brief on the merits identifies the same issue as a question presented: "[w]hether simple negligence, if proven, may form a basis of a judgment under 42 U.S.C. § 198' " Brief for Petitioner at i, *Parratt*. Point II of Nebraska's brief on the merits is captioned "The Issue of Negligence," *id.* at 14 and discussion of that issue occupies fifteen pages in a thirty page brief. The American Civil Liberties Union and a variety of *amici* were permitted to file extensive briefs as *amicus curiae* on the issue of whether section 1983 requires a particular state of mind. Since Nebraska sought certiorari in a case in which the respondent was a *pro se* litigant, in which it had to appoint counsel, and in which the Court of Appeals wrote no opinion, it is clear beyond question that the Court deliberately selected *Parratt* for review in order to consider once again whether section 1983 should for the first time be held to embody a state of mind requirement. Justice Rehnquist confirmed that this was the case, observing that the Court had

> twice granted certiorari in cases to decide whether mere negligence will support a claim for relief under § 1983, see *Procunier v. Navarette*, 434 U.S. 555 [98 S.Ct. 855, 55 L.Ed.2d 24] (1978), and *Baker v. McCollan*, 443 U.S. 137 [99 S.Ct. 2689, 61 L.Ed.2d 433] (1979), [and] in each of those cases found it unnecessary to decide the issue.

451 U.S. at 532, 101 S.Ct. at 1911. The quoted statement that in *Baker v. McCollan* it was not necessary to decide the issue is hardly consistent with *Hagans v. Lavine*. Be that as it may, in *Parratt* the Court's holding is explicit. Reviewing the legislative history of section 1983 and its prior interpretation by the Court, Justice Rehnquist wrote:

> Nothing in the language of § 1983 or its legislative history limits the statute solely to intentional deprivations of constitutional rights. In *Baker v. McCollan* we suggested that simply because a wrong was negligently as opposed to intentionally committed did not foreclose the possibility that such action could be brought under § 1983 . . . . Section 1983, unlike its criminal counterpart, 18 U.S.C. § 242, has never been found by this Court to contain a state-of-mind requirement. This Court recognized as much in *Monroe v. Pape*, 365 U.S. 167 [81 S.Ct. 473, 5 L.Ed. 2d] (1961) . . . .

451 U.S. at 534, 101 S.Ct. at 1912 (footnote omitted). Justice Rehnquist then approvingly quoted Justice Douglas' statement in *Monroe v. Pape* that section 1983 "should be read against the background of tort liability that makes a man responsible for the natural consequences of his actions." *Parratt*, 451 U.S. at 535, 101 S.Ct. at 1912-1913, *quoting* 365 U.S. at 187, 81 S.Ct. at 484. He then concluded:

> Both *Baker v. McCollan* and *Monroe v. Pape* suggest that § 1983 affords a "civil remedy" for deprivations

> of federally protected rights caused by persons acting under color of state law without any express requirement of a particular state of mind. Accordingly, in any § 1983 action the initial inquiry must focus on whether the two essential elements to a § 1983 action are present: (1) whether the conduct complained of was committed by a person acting under color of state law; and (2) whether this conduct deprived a person of rights, privileges, or immunities secured by the Constitution or laws of the United States.

Parratt, 451 U.S. at 535, 101 S.Ct. at 1913.

Thus unlike the judges who join in Judge Sloviter's opinion, Justice Rehnquist and the Justices joining in his *Parratt v. Taylor* opinion found nothing "enigmatic" in his *Baker v. McCollan* opinion. He read it, as I do, to be consistent with the unanimous interpretation of section 1983 in *Monroe v. Pape*. Moreover he read *Monroe v. Pape* in exactly the same way Judge Biggs read it for this court in *Basista v. Weir, supra*.

Only after deciding the issue of statutory interpretation tended by Nebraska did the *Parratt* Court turn to the alternative constitutional ground of decision: that for the negligent destruction of personal property a post-event tort remedy satisfies due process. The course was consistent with the Court's settled practice. Had section 1983 been interpreted as requiring a particular state of mind, rather than conduct objectively unreasonable in light of the risk of harm, the Court could, and would, have reversed on statutory rather than constitutional grounds. *See, Hagans v. Lavine, supra*. Thus the Court's discussion of the statutory issue on which it granted certiorari is unquestionably and unequivocally a holding that a failure to take reasonable care to avoid an invasion of a constitutionally protected interest is actionable under section 1983. The Court continued:

> Unquestionably, respondent's claim satisfies three prerequisites of a valid due process claim: the peti-

> tioners acted under color of state law; the hobby kit falls within the definition of property; *and the alleged loss, even though negligently caused, amounted to a deprivation.*

451 U.S. at 536-37, 101 S.Ct. at 1913 (footnote omitted) (emphasis added). It was not a deprivation without due process of law, however, but only because Nebraska, unlike New Jersey, preserved the historical liabilities of state employees for their failure to take reasonable care of property which because of their positions came into their possession.

Before a case presenting a *Parratt v. Taylor* issue reached this court the Supreme Court in *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 102 S.Ct. 1148, 71 L.Ed.2d 265 (1982) afforded further guidance with respect to the relationship between state positive law and the due process clause of the fourteenth amendment. *Logan* involved a state-created expectation that physically handicapped persons would not be discriminated against in private employment. In that case state officials in an administrative agency neglected to convene a hearing on the charge of discrimination within the time provided in the antidiscrimination statute, and the Illinois Supreme Court rejected Logan's contention that this neglect violated due process. The Supreme Court, distinguishing *Parratt v. Taylor*, held that the negligent failure to schedule a hearing deprived Logan of a state-created interest without due process. Justice Blackmun wrote:

> Despite appellee Zimmerman Brush Company's arguments, the recent decision in *Parratt v. Taylor*, 451 U.S. 527 [101 S.Ct. 1908, 68 L.Ed.2d 420] (1981) is not to the contrary. There, a state employee *negligently lost* a prisoner's hobby kit; while *the Court concluded that the prisoner had suffered a deprivation of property within the meaning of the Fourteenth Amendment*, it held that all the process due was provided by the State's tort claims procedure.

455 U.S. at 435, 102 S.Ct. at 1157 (emphasis supplied). Thus the opinion of the Court in *Logan* confirms what is plain in *Parratt*; a negligent deprivation of property by a state officer is a deprivation of property within the meaning of the fourteenth amendment.[23] The *Logan* Court's treatment of *Ingraham v. Wright* is also significant. Justice Blackmun wrote:

> In *Ingraham v. Wright*, 430 U.S. 651 [97 S.Ct. 1401, 51 L.Ed.2d 711] (1977), the Court concluded that state tort remedies provided adequate process for students subjected to corporal punishment in school. In doing so, however, the Court emphasized that the state scheme "*preserved what 'has always been the law of the land,'*" *id.*, at 679 [97 S.Ct. at 1416], quoting *United States v. Barnett*, 376 U.S. 681, 692 [84 S.Ct. 984, 990, 12 L.Ed.2d 23] (1964), and that adding additional safeguards would be unduly burdensome. 430 U.S., at 680-682 [97 S.Ct. at 1417-1418]. Here, neither of those rationales is available. Terminating potentially meritorious claims in a random manner is hardly a practice in line with our common-law traditions.

455 U.S. at 436 n. 10, 102 S.Ct. at 1158 n. 10 (emphasis supplied).

Justice Blackmun's reference to preservation of what has always been the law of the land is significant, because until the New Jersey legislature decreed otherwise, it had always been the law of the land that custodians of incarcerated persons had a duty to take reasonable care to prevent third parties from inflicting harm on their charges. The law of the land in that respect is re-

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[23] Judge Sloviter mentions *Logan v. Zimmerman Brush Co.*, p. 830, but her selective quotation unfairly ignores those parts of Justice Blackmun's opinion in which he discusses issues relevant to this case.

flected in the rule announced in Restatement (Second) Torts, § 320 (1965).

> One who is required by law to take or who voluntarily takes the custody of another under circumstances such as to deprive the other of his normal power of self-protection or to subject him to association with persons likely to harm him, is under a duty to exercise reasonable care so as to control the conduct of third persons as to prevent them from intentionally harming the other or so conducting themselves as to create an unreasonable risk of harm to him, if the actor (a) knows or had reason to know that he has the ability to control the conduct of the third persons, and (b) knows or should know of the necessity and opportunity for exercising such control.

Id. Before New Jersey joined California in relieving public employees of their historically recognized duties under the law of the land, the rule announced in Restatement (Second) Torts, § 320 (1965) was the law of that state. *Harris v. State*, 61 N.J. 585, 297 A.2d 561 (1972).[24] The rule in *Logan* states plainly that the decision in *Ingraham v. Wright* would have been otherwise if

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[24] The rule is not a recent innovation. Both the black-letter and Comments in Restatement (Second) Torts § 320 (1965) are taken verbatim from Restatement (First) Torts § 320 (1934). Comment (a) provides that "[t]he rule stated in this Section is applicable to a sheriff or peace officer, a jailer or warden of a penal institution, officials in charge of a state asylum or hospital for the criminally insane, or to teachers or other persons in charge of a public school. It is also applicable to persons conducting a private hospital or asylum, a private school, and to lesees of convict labor." *See, e.g., Necolayff v. Genesee Hospital*, 270 A.D. 648 (N.Y.App. Div.), 61 N.Y. S.2d 832, 836 (1946), *affirmed*, 296 N.Y. 936, 73 N.E.2d 117 (1947) (Section 320 duty of care applies to hospital patients); *Daniels v. Andersen*, 195 Neb. 95, 237 N.W.2d 397, 400 (1975) (Section 320 duty of care obliges jailer to take reasonable care to prevent beating by a fellow inmate).

Florida in that case had attempted to relieve school officials of the duty of care imposed by the common law.

After *Logan v. Zimmerman Brush Co.* was decided a case presenting operative facts similar to those in *Parratt v. Taylor* was filed in the District of New Jersey. Charles Holman, a prisoner serving a life sentence had attempted to replevy personal property, or to recover its value, in a New Jersey state court.[25] Without considering any section 1983 claim the state court, relying on N.J.Stat.Ann. 59:5-3 (West 1982) dismissed.[26] The prisoner then commenced a section 1983 action in the federal court, and moved for partial summary judgment challenging the constitutionality of section 59:5-3. Judge Debevoise, in a carefully reasoned opinion which relied on *Parratt* and *Logan*, granted a partial summary judgment, holding that as applied to Holman, section 59:5-3 was unconstitutional, in that it deprived Holman of important interests in property without due process.

The trial court certified the case for interlocutory review pursuant to 28 U.S.C. § 1292(b) (1982), and this court, after careful consideration of essentially the same contentions made by New Jersey in the instant appeal, affirmed. Judge Hunter, who today mysteriously joins in Judge Sloviter's opinion, wrote:

> Reading *Parratt* and *Logan* together, it is plain that while *Parratt* may relegate a prisoner to his state tort remedies when such remedies are available, *Logan* provides the framework for analyzing the constitutional adequacy of state procedural limitations on those remedies. Therefore the principles of *Logan* are applicable in cases where it is claimed

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[25] *Holman v. Hilton*, 542 F.Supp. 913 (D.C.N.J. 1982).

[26] That section of the Tort Claims Act prohibits suits by prisoners against any public entity or public employee while the prisoner is confined. That provision is applicable to Davidson, but the provisions referred to in the text would prohibit a suit for the injuries he suffered in this case even after his release.

> that the State refuses to make available to a claimant the established state procedures otherwise available for redress of deprivations of property.

Holman v. Hilton, 712 F.2d 854, 858 (3d Cir. 1983). Judge Hunter then proceeded to analyze the effect of N.J. Stat. Ann. 59:5-3 on *Holman*, concluding that while that section of the Tort Claims Act only postponed a lawsuit, tolling the statute of limitations in the meantime, its effect on a prisoner serving a life or long-term sentence was no different, practically, than had the remedy been totally eliminated. 712 F.2d at 859. Since this was so, Holman could bring a section 1983 action for the negligent loss of his property.

The opinions in *Holman v. Hilton* are honest treatments of the Supreme Court case law dealing with the question whether section 1983 includes a state of mind requirement, and they should control the outcome of this case. Judge Sloviter's treatment of the *Holman* precedent is discussed, *infra*.

After our decision in *Holman*, and after the decision of the trial court in this case the Supreme Court in *Smith v. Wade*, 461 U.S. 30, 103 S.Ct. 1625, 75 L.Ed.2d 632 (1983) confirmed that it meant just what it had said in *Parratt v. Taylor* and *Logan v. Zimmerman Brush Co.* In *Smith v. Wade*, which also involved a section 1983 suit against prison officials for failing to prevent fellow prisoners from harming an inmate, a jury awarded both compensatory and punitive damages. Because the case had been tried as a violation of the eighth amendment, the court's charge to the jury required a finding of gross negligence. On certiorari the defendants conceded liability for compensatory damages, but contended that punitive damages should not have been awarded absent a finding of intentional misconduct. In light of the concession on liability for compensatory damages the Supreme Court had no occasion to consider whether a gross negligence charge was required in every section 1983 action.

Reviewing the case law, however, the Court concluded that at common law a finding of "recklessness, serious indifference to or disregard for the rights of others, or even gross negligence" permitted an award of punitive damages. 461 U.S. at 47-48, 103 S.Ct. at 1636. Justice Brennan continued:

> The remaining question is whether the policies and purposes of § 1983 itself require a departure from the rules of tort common law. As a general matter, we discern no reason why a person whose federally guaranteed rights have been violated should be granted a more restrictive remedy than a person asserting an ordinary tort cause of action.

Id. at 49, 103 S.Ct. at 1636. Thus the Court stated unequivocally that section 1983 permitted all the remedies recognized by the common law of torts. One of those remedies is the recovery of damages for the failure of a custodian to take reasonable care to prevent third parties from inflicting harm on those in their custody.[27] In light of *Smith v. Wade*, an intermediate appellate court is not free to read into section 1983 a higher standard for tort liability than the common law has historically recognized.

Even while this appeal was pending the Supreme Court reconfirmed that the key factor in *Parratt v. Taylor* was the availability of a state common law tort remedy, following a negligent deprivation of property. *Hudson v. Palmer*, —— U.S. ——, 104 S.Ct. 3194, 82 L.Ed.2d 393 (1984). Indeed Chief Justice Burger stated explicitly that *Parratt v. Taylor* "held that a negligent deprivation of property by state officials does not violate the Four-

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[27] Even the dissenters in *Smith v. Wade* did not urge that for compensatory damages a different state of mind than failure to take reasonable care was required. They only urged that more than gross negligence or reckless disregard should be required for the award of punitive damages. *Id.* 461 U.S. at 56, 103 S.Ct. at 1640 (Rehnquist, J., dissenting); *id.* at 94, 103 S.Ct. at 1658 (O'Connor, J., dissenting).

teenth Amendment if an adequate postdeprivation state remedy exists." ——- U.S. at ——, 104 S.Ct. at 3196. In *Hudson* the same rule was applied to intentional deprivations occurring in violations of established state procedures. But the case makes clear that both negligent and intentional deprivations are remediable under section 1983 when, as here, the state has eliminated post-deprivation remedies.

In view of the unbroken line of authorities from *Monroe v. Pape* in 1961 through *Hudson v. Palmer* in 1984 the majority's effort to read into section 1983 a state of mind requirement is utterly untenable.

V.

The Majority's Unprincipled Treatment of Precedent

Judge Sloviter's treatment of precedents that should be regarded as controlling is deeply disturbing; the treatment of *Holman v. Hilton* is particularly so. That decision is mentioned in three contexts.

At one point the majority opinion states that section 1983 "plays an effective role . . . in providing a federal forum to challenge an established state procedure that infringes upon an individual's liberty or property interests, such as . . . the New Jersey statute prohibiting prisoners from bringing tort actions against public entities or employees while confined struck down in *Holman v. Hilton*, 712 F.2d 854 (3d Cir. 1983)." At 829-830. Why, one must ask, should section 1983 play a less effective role in providing a forum to challenge the far more drastic prohibitions in N.J. Stat. Ann. §§ 59:2-4, 59:5-4, 59:6-2, 59:6-7 and 59:5-2(b)(4)? An answer to that obvious question is attempted:

> In the first place, plaintiff here, unlike the plaintiff in *Holman v. Hilton*, 712 F.2d 854 (3d Cir. 1983), has not challenged the constitutionality of the

> statute. Plaintiff's claim, instead, is only the money damages from the defendants for the injuries inflicted by the assault.

At 831. That dissembling description of Davidson's *pro se* pleading—a complaint comprised of a printed form furnished by the district court in which Davidson, following instructions, filled in the blanks—is an outrageous violation of the standards announced in *Haines v. Kerner*, 404 U.S. 519, 92 S.Ct. 594, 30 L.Ed.2d 652 (1972) for measuring the sufficiency of a *pro se* litigant's pleading. It disregards, moreover, the concluding prayer in the complaint for "[a]ny other relief equitable and just that the Court deems just and appropriate." App. Da 4. Had counsel been appointed in the district court there might be some justification for distinguishing *Holman v. Hilton* by insisting that Davidson had failed to plead his legal theories with sufficient specificity. In fact, however, Davidson proceeded *pro se* throughout the trial, and counsel was appointed for him only in this court. Plainly Judge Brotman who conducted the trial assumed throughout that Davidson was pursuing relief under section 1983 because the Tort Claims Act prohibited him from recovering from Cannon and James under state law. That is the same issue decided in *Holman v. Hilton*, and discussed by the Supreme Court in *Martinez v. California*, 444 U.S. 277, 285, 100 S.Ct. 553, 559, 62 L.Ed.2d 481 (1980), a case which Judge Brotman cites in his opinion. App. Da 19. The suggestion that the interrelationship between the Tort Claims Act and section 1983 was not presented, and litigated, is an insult to Judge Brotman's considerable intelligence. His own words, quoted in the margin, remove any doubt about the issues which were presented to him, and which he tried.[28]

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[28] Judge Brotman wrote:

> The first step is to inquire whether the assault here implicates a "liberty interest" protected by the due process clause. Freedom from physical attack and injury undeniably

The heart of the majority opinion, however, is its final "distinction" of *Holman v. Hilton*. Judge Sloviter writes:

> In the second place, a claim for procedural due process must be predicated on deprivation of a sub-

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falls within the compass of constitutionally protected liberty. To be free of personal violence is the basic core of liberty. "To be free from, and to obtain judicial relief for, unjustified intrusions on personal security . . . [is one of] the historic liberties" protected at common law and by the due process clause. *Ingraham v. Wright*, 430 U.S. 651, 672-73 [97 S.Ct. 1401, 1413, 51 L.Ed.2d 711] (1977). *See Youngberg v. Romeo*, [457 U.S. 307], 102 S.Ct. 2452 [73 L.Ed.2d 28] (1982). Even while incarcerated, plaintiff enjoys a constitutionally protected interest in conditions of reasonable care and safety.

Defendants emphasize that plaintiff seeks to recover damages for a single attack. They refer to recent statements by the court of appeals that "[t]he right to protection is not actuated by an isolated mishap, or called into question by each bruise that a patient [here, prisoner] may suffer," and that "no one is guaranteed an injury-proof life." *Romeo v. Youngberg*, 644 F.2d 147, 162 (3d Cir. 1980), *vacated and remanded*, 457 U.S. 307, 102 S.Ct. 2452, 73 L.Ed.2d 28 (1982). But as defendants have also pointed out, the critical aspect is not the weight of the interest, but its nature. *Board of Regents v. Roth*, 408 U.S. 564, 570-71 [92 S.Ct. 2701, 2705-06, 33 L.Ed.2d 548] (1972). Thus the first analytical step is whether security from assault is within the ambit of "liberty." Whetner the assault is aggravated or repeated does not alter its nature, but simply its weight.

Furthermore, the instant case is not about a "bruise" or an inadvertent accident. It does not involve some "de minimis" personal injury, but a vicious and traumatic attack inflicting severe wounds. The defendants were personally apprised of the anticipated assault, and knowing of McMillian's violent character, did nothing to prevent its occurrence. Had reasonable precautions been taken, even as simple as issuing a warning to McMillian, the evidence suggests that plaintiff would not have been injured. Defendants knew that McMillian represented a "special danger" to plaintiff. *Cf. Martinez v. California*, 444 U.S. 277, 285 [100 S.Ct. 553, 559, 62 L.Ed.2d 481] (1980).

Defendants argue that plaintiff did not enjoy a "liberty interest" in his personal security because defendants did not

stantive right or interest created by the Constitution, a statute or other entitlement . . . . Since we have rejected Davidson's claim that his substantive right under the Fourteenth Amendment was deprived by defendants' negligence, and there has been

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intentionally permit the assault, but were merely negligent about his safety. This argument confuses the notion of liberty interest with the notion of deprivation. State of mind has no relevance for purposes of identifying what is a liberty interest and what is not.

Rather, we believe defendants' argument is that state of mind is significant for purposes of determining whether the defendant *deprived* plaintiff of his liberty. Defendants suggest that unless the actions of the state officials were intentional, reckless, or malicious, there has been no "deprivation" of rights. But as we have discussed in our prior opinion, the Supreme Court has held that a state official's negligence is sufficient to constitute a "deprivation" for due process purposes. *Parratt v. Taylor*, 451 U.S. 527 [101 S.Ct. 1908, 68 L.Ed.2d 420] (1981). We do not agree with defendants that *Parratt's* holding regarding negligent deprivation is irrelevant to the instant case on the ground that *Parratt* involved a property rather than a liberty interest. We do not believe these categories are so rigid. The distinction between property and liberty interests does not alter the relevant reasoning, which is that § 1983 does not include a requirement that the official's act be intentional. Defendants asserts that we should impose a "deliberate indifference" standard, borrowed from the Eighth Amendment. *See Estelle v. Gamble*, 429 U.S. 97 [97 S.Ct. 285, 50 L.Ed.2d 251] (1976). This standard was rejected as inappropriate under due process analysis in *Youngberg v. Romeo*, [457 U.S. 307], 102 S.Ct. at 2456 n. 11.

Defendants Cannon and James, acting under authority of state law, negligently deprived plaintiff of his liberty interest in remaining free from physical assault. This brings us to the second step of due process analysis, to inquire whether the state has provided the "process" which is due under the circumstances. As we discussed in our prior opinion, New Jersey provides plaintiff no process whatsoever by which to pursue a remedy against the state or state officials for injuries inflicted by another prisoner. N.J.Stat.Ann. 59:5-2 (West 1982).

App. Da 18-Da 20 (footnote omitted).

> no claim of a statutory or other entitlement, there is nothing to trigger an inquiry into what process is due.

At 831. There are two ways in which these obscurant sentences may be read. One possible reading is that *Holman v. Hilton* survives, with respect to property interests created by state positive law, but does not apply to loss of life or invasion of bodily security. The other is that the failure to take reasonable care to prevent a loss of property does not amount to a deprivation of property.

If, as I suspect, the first reading is what is intended, then the majority opinion is an example of perverse obverse *Lochnerism*. The fundamental error of *Lochner v. New York*, 198 U.S. 45, 25 S.Ct. 539, 49 L.Ed. 937 (1905) was the Court's attempt to remove contract, which was always a matter of positive property law, from the reach of law by converting contract into a liberty interest. The object, and temporary result, was to preserve the status quo between employers and employees. What the majority is doing is worse. Rather than elevating property interests to the status of liberty interests, it denegrates the latter by holding that they shall receive less protection than has been afforded the former.

If, on the other hand, what is intended is that the negligent destruction of property, absent a state post-destruction remedy, is not a deprivation within the fourteenth amendment, then *Holman v. Hilton*, announced only 14 months ago, has proved to be "a restricted railroad ticket, good for this day and train only." *Smith v. Allwright*, 321 U.S. 649, 669, 64 S.Ct. 757, 768, 88 L.Ed. 987 (1944) (Roberts, J., dissenting). Of course the Court *in banc* is free to play fast and loose with its own precedents, however unwise that course may be.

The court *in banc* is not similarly free, however, to play fast and loose with the Supreme Court's precedents. The cases discussed in Part IV above cannot, consistently

with our position as an intermediate court, be given the short shrift treatment reflected in Judge Sloviter's opinion. Moreover cases on which that opinion relies, not discussed in part IV, do not support the reversal of Davidson's judgment. Several of those cases require special mention.

Judge Sloviter quotes *Estelle v. Gamble*, 429 U.S. 97, 106, 97 S.Ct. 285, 292, 50 L.Ed.2d 251 (1976) in support of the proposition that a state may relieve its agents of the duty to take reasonable care to prevent harm to persons entrusted to their custody. At 824. Like so much else in her opinion the quotation, taken out of context, is used for a misleading purpose. Unlike the states of New Jersey and California, Texas did not relieve its agents rendering medical care to prisoners of the duty of reasonable care. A post-treatment negligence action was available in the Texas courts. 429 U.S. at 107, 97 S.Ct. at 292 (referring to Tex. Civ. Code Ann. art. 6252-19 (Vernon 1970 & Supp. 1984)). An examination of the petition for certiorari discloses quite clearly that it did not present any issue relevant to this case. The petitioners construed the *pro se* complaint as one presenting an eighth amendment claim, and none other. The response to the petition by court appointed counsel and the briefs filed by both sides all proceed on the same assumption. 429 U.S. at 101-02, 97 S.Ct. at 289-90. Nothing was decided in *Estelle v. Gamble* other than that the eighth amendment required a showing of more than negligence. That case cannot be treated as authority for state power to relieve custodians, or even physicians, of the duty to take reasonable care.

Judge Sloviter similarly attempts to wring from *Paul v. Davis*, 424 U.S. 693, 96 S.Ct. 1155, 47 L.Ed.2d 405 (1976) support for the proposition that custodians may be relieved of the obligation to take reasonable care to prevent harm. At 824. Once again a question, taken out of context, is used for a misleading purpose. *Paul v. Davis* holds that absent some expectation created by state law there is no substantive interest to be protected by the

due process clause. That holding is in my view unfortunate, since it misses the point that human personality has a psychological as well as physical component, either of which is susceptible to injury. That notwithstanding, the holding has no relevance to this case, for here the injury to Davidson was plainly physical. Moreover this court holds unanimously that entirely aside from state positive law there is a liberty interest in personal security from physical injury. Thus Judge Sloviter's reliance on *Paul v. Davis* in Part IV of her opinion is inconsistent with the analysis made in Part III, in which the entire court joins.

Judge Sloviter also opines that the court's "holding avoids the anomalies that would result . . . were a prisoner to be entitled under the Constitution to a higher standard of care than an involuntarily committed mental patient, *see Youngberg v. Romeo*, 457 U.S. 307 [102 S.Ct. 2452, 73 L.Ed.2d 28] (1982)." At 831 n.9. Plainly, then, the majority assumes that New Jersey can, as it has done, validly relieve custodians of the mentally ill and the mentally retarded of the duty to take reasonable care to prevent harm from befalling those unfortunates. *Youngberg v. Romeo* announced no such uncivilized doctrine. As Part III of the majority opinion concedes, *Romeo* recognizes a liberty interest in freedom from bodily harm. In determining the standard of care appropriate for the protection of that interest, the Supreme Court adopted the standard proposed by Chief Judge Seitz in this court: the exercise of accepted professional judgment. 457 U.S. at 321, 323, 102 S.Ct. at 2461, 2462. That standard *is* the standard of the common law. Moreover it is precisely the standard from which Cannon and James departed. They failed to discharge their duties as professional custodians of prisoners in accordance with the accepted standards of that calling. The trial court so found, and this court agrees, unanimously, that this finding is not clearly erroneous. Judge Sloviter's treatment of *Youngberg v. Romeo* is

nothing less than a backhanded rejection of the standard of care which it announced. This development bodes ill not only for prisoners but also for the involuntarily committed everywhere in this circuit.

Finally, Judge Sloviter's oblique suggestion that the "conduct that shocks the conscience" language in *Rochin v. California*, 342 U.S. 165, 172, 72 S.Ct. 205, 209, 96 L.Ed. 183 (1952) establishes the standard of liability for section 1983 cases, because "[t]he Court did not say whether anything less would suffice," at 830, is irresponsible. That case was a direct criminal appeal involving the issue whether evidence obtained by use of a stomach pump could be admitted in a criminal trial. Justice Frankfurter wrote:

> The faculties of the Due Process Clause may be indefinite and vague, but the mode of their ascertainment is not self-willed. In each case "due process of law" requires an evaluation based on a disinterested inquiry pursued in the spirit of science, on a balanced order of facts exactly and fairly stated, on the detatched consideration of conflicting claims, . . . on a judgment not *ad hoc* and episodic but duly mindful of reconciling the needs both of continuity and of change in a progressive society.
>
> Applying these general considerations to the circumstances of the present case, we are compelled to conclude that the proceedings by which this conviction was obtained do more than offend some fastidious squeamishness or private sentimentalism about combatting crime too energetically. This is conduct that shocks the conscience.

Id. (citation omitted). The suggestion that the descriptive phrase in the last quoted sentence defined, for Justice Frankfurter, or any other Justice, the maximum content of the due process clause in a personal liberty context, is simply preposterous. Even if this untenable suggestion were to be adopted as the relevant standard,

New Jersey's statutory abrogation of the duty of custodians to take reasonable care to prevent harm from befalling those it has incarcerated may not shock the majority's conscience, but it surely shocks mine.

VI.

The Absence of Caseload Benefits

Some of those joining in the majority opinion are engaged, one suspects, in a quixotical quest for devices which will make our burgeoning caseload disappear.[29] The gross negligence standard which has been adopted by the majority as the due process minimum will afford no relief in this respect. The pleadings in this case illustrate the problem perfectly. The complaint was made on the district court's printed form, tailored for prisoners' use. In Part IV of the form, captioned "Statement of Claim" the *pro se* litigant is instructed:

> State here as briefly as possible the *facts* of your case. Describe how each defendant is involved. Include also the names of other persons involved, dates and places. Do not give any legal arguments or cite any cases or statutes.

App. Da 3. (emphasis in original). The instructions are consistent with the pleading standards announced in *Haines v. Kerner*, 404 U.S. 519, 92 S.Ct. 594, 30 L.Ed. 2d 652 (1972) and *Conley v. Gibson*, 355 U.S. 41, 78 S.Ct. 99, 2 L.Ed.2d 80 (1957). Davidson followed them, by simply stating what transpired. He did not mention any standard of care. The court could not on the basis of his statement of claim rule as a matter of law that he would be unable to establish gross negligence. Moreover even if the majority were to impose a requirement that those magic words be included, they would soon ap-

---

[29] See note 19 *infra*.

pear in every *pro se* or counseled complaint seeking money damages.

Moreover, even at trial the distinction between gross negligence and failure to take reasonable care under the circumstances is not one that is susceptible of application as a matter of law.

> The prevailing view is that there are no "degrees" of care or negligence, as a matter of law; there are only different amounts of care as a matter of fact; and "gross" negligence is merely the same thing as ordinary negligence, "with the addition," as Baron Rolfe once put it, "of a vituperative epithet."

W. Prosser, Handbook of the Law of Torts, 182 (4th ed. 1971) (footnotes omitted). In every case the facts still will have to be developed, and the case will be rare, indeed, when a trial court will discern a line between "gross" and "mere" negligence clear enough to grant a summary judgment or to direct a verdict which would not otherwise have been granted.

VII.

The Necessity of a Remand

What I have said about the fact-sensitive distinction between the pejorative "gross" negligence and the equally pejorative "mere" negligence suggests that even on the majority's analysis the proper result should be a remand. Obviously Davidson, a *pro se* litigant, was unaware of the metaphysical distinction which the majority has invented. Moreover Judge Brotman, because he relied on the plain statement in *Parratt v. Taylor* that negligence sufficed, did not consider whether the conduct of Cannon and James amounted to gross negligence. The case was tried non-jury. The trial court heard the testimony and saw the demeanor of the witnesses. At the very least that court should be afforded an opportunity to reappraise the evidence in light of the new standard which the majority announces.

VIII.

Conclusion

The holding in this case, that custodians of the involuntarily committed may be relieved of the duty to take reasonable care to prevent harm to persons committed to their charge who are deprived of the ability to resort to self help, is inconsistent with settled Supreme Court case law, inhumane, and indecent. The judgment in Davidson's favor should be affirmed. At the very least the case should be remanded so that the trial court may reconsider the evidence in light of the new standard which the majority announces. I dissent.

A. LEON HIGGINBOTHAM, Circuit Judge, dissenting.

I dissent for the substantive reasons stated in the opinions of Judges Seitz and Gibbons. I would affirm the judgment of the court below.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 82-5743

ROBERT DAVIDSON

vs.

EDWARD O'LONE, Superintendent,
ARTHUR JONES, Hearing Officer,
JOSEPH CANNON, Superintendent and
ROBERT JAMES, Internal Affairs

JOSEPH CANNON and ROBERT JAMES, APPELLANTS

(D.C. Civil No. 81-253)

On Appeal from the United States District Court
for the District of New Jersey—Camden

Present: ALDISERT, *Chief Judge**, SEITZ, GIBBONS, HUNTER, WEIS, GARTH, HIGGINBOTHAM, SLOVITER and BECKER, *Circuit Judges*

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the District of New Jer-

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* At the time of the reargument in banc, Judge Seitz was Chief Judge.

sey and was argued by counsel December 1, 1983, and reargued before the Court in banc May 7, 1984.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court, entered October 15, 1982, be, and the same is hereby reversed and the cause is remanded to the said District Court which is directed to enter judgment for the defendants. Costs taxed against appellee.

ATTEST:

/s/ Salley [Illegible]
Clerk

December 27, 1984

Certified as a true copy and issued in lieu of a formal mandate on January 18, 1985

Test: /s/ M. Elizabeth Ferguson
Chief Deputy Clerk
United States Court of Appeals
for the Third Circuit.

Supreme Court, U.S.
FILED
SEP 19 1985
JOSEPH F. SPANIOL, JR.
CLERK

No. 84-6470

In The

Supreme Court of the United States

October Term, 1985

ROBERT DAVIDSON,

Petitioner,

v.

JOSEPH CANNON and
ROBERT JAMES,

Respondents.

**ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT**

BRIEF FOR RESPONDENTS

IRWIN I. KIMMELMAN
Attorney General of New Jersey

R.J. Hughes Justice Complex
CN 112
Trenton, New Jersey 08625
(609) 633-7089
Attorney for Respondents

JAMES J. CIANCIA
Assistant Attorney General
Of Counsel

MADELEINE WATERS MANSIER*
Deputy Attorney General
On the Brief

*Counsel of Record

COCKLE LAW BRIEF PRINTING CO., (800) 835-7427 Ext. 333

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QUESTIONS PRESENTED

1. Whether the Court of Appeals for the Third Circuit erred in holding that petitioner, a state prisoner, had a constitutionally protected liberty interest in being free from a single assault by another prisoner?

2. If petitioner did have a constitutionally protected liberty interest, whether the Court of Appeals properly held that respondents' mere negligence did not rise to the level of a deprivation of that interest?

3. If respondents' simple negligence was sufficient to deprive petitioner of a protected liberty interest, whether that deprivation was a deprivation with procedural due process, despite an immunity provided by state law, and therefore not in violation of the Fourteenth Amendment?

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STATEMENT OF THE CASE

This is a civil rights action brought by petitioner Robert Davidson, a state prisoner, against Joseph Cannon and Robert James, two prison officials, pursuant to 42 U.S.C. §1983 (J.A.5; J.A.83). Petitioner claims that respondents violated his Eighth and Fourteenth Amendment rights by failing to adequately protect him after he informed them of a threat made against him by another prisoner (J.A.8).

According to the findings of fact in the district court, based on the testimony at trial, on Friday, December 19, 1980, a state prisoner named McMillian told petitioner, "I'll fuck you up you old mother-fucking fag. Go up to your cell, I be right there" (J.A.85; J.A.98). Petitioner told Officer Jose Garcia of the threat and then, at Garcia's suggestion, wrote a note about the threat (J.A.85; J.A.98-J.A.99). Petitioner candidly testified that he did not write the note because of any concern for his own safety (J.A.75), but rather to exonerate himself "if" further trouble developed between himself and McMillian (J.A.75; J.A.82; J.A.85). Petitioner did not request protective custody or any other protective measures (J.A.85).

Officer Garcia took the note to respondent Joseph Cannon, Assistant Superintendent (J.A.41; J.A.86). Cannon, who had known petitioner since the early 1960's, interpreted petitioner's actions in reporting the incident to Officer Garcia rather than to Cannon himself as meaning that petitioner was seeking exoneration, not protection (J.A. 42). That interpretation was, according to petitioner's own testimony, absolutely correct. Nevertheless, Cannon instructed Garcia to take the note to respondent Robert James in Internal Affairs for investigation (J.A.45; J.A.86). When Garcia arrived at James' office, James was in the midst of investigating a report that another inmate had a shank in his cell and had stabbed someone

(J.A.51). Although Garcia verbally informed James that the note concerned a threat against petitioner, he did not indicate any urgency about the note (J.A.50-J.A.51; J.A.86). James left the folded note on his desk, unread, because of the shank crisis (J.A.51; J.A.86-J.A.87). When James finished his shift at 4 p.m., he worked a second shift in another capacity, as Assistant Center Keeper, dealing with a variety of situations and problems (J.A.54; J.A.87). When James left the prison at 10:30 p.m., he forgot about the unread note on his desk back in Internal Affairs (J.A.59; J.A.87). If he had remembered it, he would have posted it in the Center to alert officers on the next shift (J.A.59-J.A.60; J.A.87).

Neither Cannon nor James worked on the weekend of December 20 and 21, 1980 (J.A.47-J.A.48; J.A.87). On Sunday morning, December 21, 1980, McMillian, contrary to petitioner's own expectations, carried out his threat, stabbing petitioner with a fork and breaking his nose (J.A.75; J.A.87).

The district court, after a non-jury trial, concluded that petitioner had not established a claim of cruel and unusual punishment in violation of the Eighth Amendment "because respondents did not act with deliberate or callous indifference to petitioner's needs and because the incident complained of was a single attack" (J.A.89). However, the district court did find that respondents deprived petitioner of a protected liberty interest without due process of law, in violation of the Fourteenth Amendment (J.A.-89-J.A.94). First, the court identified a cognizable liberty interest in remaining free from physical attack (J.A.89). Then the court concluded that respondents deprived petitioner of that liberty interest even though their failure to protect petitioner was merely negligent. The court inter-

preted *Parratt v. Taylor*, 451 U.S. 527 (1981) as holding that negligence is sufficient to constitute a deprivation for purposes of 42 U.S.C. §1983 and applied *Parratt*, a property case, to petitioner's liberty interest. Finally, the court concluded that respondents' deprivation of petitioner's liberty interest was without procedural due process because N.J. Stat. Ann. 59:5-2(b) (4) prevented petitioner from recovering monetary damages from respondents (J.A.91-J.A.92). N.J. Stat. Ann. 59:5-2(b) (4) provides in pertinent part, "Neither a public entity nor a public employee is liable for . . . any injury caused by . . . a prisoner to any other prisoner. . . ." Judgment was entered in favor of petitioner, awarding him $2,000 in compensatory damages (J.A.93).

The United States Court of Appeals for the Third Circuit, en banc, reversed (J.A.123). Speaking through Circuit Judge Sloviter, the court affirmed the district court's determination that petitioner had a liberty interest in bodily integrity (J.A.104). The court also affirmed the district court's findings that respondents were negligent because Cannon, although he followed the established procedure in directing petitioner's note to James, "simply failed to follow up" and James, "who was operating under a double shift burden, merely forgot to investigate a prisoner's note, which was ambiguous as to the nature of the threat, and conveyed no sense of urgency" (J.A.102; J.A.120). However, the court stated that "[t]he essential element of a §1983 action is abuse by a state official of his or her official position" (J.A.115). Consequently, the court held, "When the only finding is that of mere negligence, as here, we cannot find the 'outrageousness' or abuse of official power that warrants raising the tortious conduct of the prison official[s] to the level of a

deprivation of [a] constitutional right within the scope of §1983" (J.A.120). Having found no "deprivation" of petitioner's liberty interest in the first instance, the court rejected petitioner's claim that he was deprived of his liberty interest without procedural due process based on the immunity provided by N.J. Stat. Ann. 59:5-2 (J.A.121-J.A. 122).

In a concurring opinion, Circuit Judges Garth and Weis agreed with the majority that respondents' mere negligence did not constitute a deprivation of petitioner's liberty interest (J.A.123). However, they went further in opining that even if respondents' mere negligence could constitute a deprivation of petitioner's liberty interest, that deprivation was not without procedural due process and therefore did not violate the Fourteenth Amendment (J.A.123-J.A.124). Recognizing the immunity provided to respondents by state statute for petitioner's claim, the concurrence urged a balancing test to determine whether procedural due process is nevertheless afforded (J.A.124). Balancing the state's strong interests in preserving prison order and safety and in protecting from liability prison officials faced with such difficult tasks against a prisoner's desire to obtain money for injury suffered from a negligent failure to protect him from assault by another prisoner, the concurrence struck the balance in favor of respondents (J.A.126). Thus, petitioner "has had all the process which is his due" (J.A.126).

In three separate dissents Circuit Judges Seitz, Gibbons and Higginbotham would have affirmed, essentially for the reasons set forth in the district court's opinion (J.A.129; J.A.162; J.A.172).

This Court granted a writ of certiorari on June 3, 1985.

SUMMARY OF ARGUMENT

Although the Court of Appeals for the Third Circuit erred in holding that petitioner had a liberty interest in remaining free from a single assault by another prisoner, the court properly concluded that respondents' negligent conduct was not sufficient to deprive petitioner of that liberty interest. Furthermore, even if negligent conduct would support petitioner's claim of a deprivation of his liberty interest, that deprivation was not without due process and therefore did not violate the Fourteenth Amendment. Consequently, respondents submit that the judgment of the Third Circuit should be affirmed.

Petitioner boldly asserts, without analysis, that the court below correctly held that he had a liberty interest in remaining free from physical assault. If petitioner had been assaulted by respondents themselves, or if respondents had stood by and watched the assault without taking action, or if respondents had encouraged or acquiesced in the assault, respondents would agree that petitioner had a liberty interest. But those are not the facts. Respondents urge this Court to determine that a prisoner's liberty interest is not so broad as to encompass a single assault by another prisoner in the absence of the foregoing circumstances. Furthermore, if this Court decides that petitioner's liberty interest is as broad as he claims, that was not the clearly established law at the time of the

incident. Therefore, respondents are entitled to qualified immunity.

In any event, even if petitioner did have a liberty interest here, the court of appeals correctly held that he was not deprived of that interest because respondents were merely negligent. The question of whether negligence will support a due process claim under 42 U.S.C. §1983 has never been determined by this Court. Although there was reference to negligent conduct in *Parratt v. Taylor*, 451 U.S. 527 (1981), a determination of the defendant's state of mind was not essential to the decision in that case. Regardless of the defendants' state of mind there was no constitutional violation because the available state remedy adequately met due process requirements. *Hudson v. Palmer*, — U.S. —, 104 S.Ct. 3194 (1984), reaffirms that view.

In any event, this Court can, and should, decide now that negligence will not support a due process claim under §1983; i.e. that there is no constitutional right to be free from an official's simple mistakes. That would be consistent with the legislative history of §1983, which was enacted to remedy abuses of official power, not mere negligence. It would also be consistent with decisions by many courts of appeals, even since *Parratt*, which held that conduct must be worse than negligent to rise to the level of a constitutional deprivation.

Finally, even if petitioner did have a liberty interest, and even if respondents' negligence did deprive him of that interest, that deprivation was not without due process. Petitioner asserts that the immunity provided to respondents by N.J. Stat. Ann. 59:5-2(b)(4) for an injury caused by one prisoner to another automatically deprives him of

due process. An immunity is not a *per se* denial of due process, as the viability of judicial immunity, for example, amply demonstrates. Instead, if the immunity is reasonable, not irrational or arbitrary, when balanced against the prisoner's interest in recovering money, the immunity satisfies due process requirements. The concurring opinion below engaged in just such a balancing test and decided that it favored respondents. This Court is urged to adopt that reasoning.

For any one of the three reasons cited above -- the absence of a liberty interest, the absence of a deprivation, or the absence of a denial of due process -- the judgment of the court of appeals should be affirmed.

ARGUMENT

POINT I

PETITIONER, A STATE PRISONER, HAD NO CONSTITUTIONALLY PROTECTED LIBERTY INTEREST IN BEING FREE FROM A SINGLE ASSAULT BY ANOTHER PRISONER.

The district court found that petitioner had a liberty interest protected by the due process clause in remaining free from physical attack and injury and "free of personal violence" (J.A.89). In so holding, the court relied primarily on *Ingraham v. Wright*, 430 U.S. 651 (1977), and *Youngberg v. Romeo*, 457 U.S. 307 (1982) (J.A.90). The court of appeals framed the issue as follows:

> whether plaintiff as a state prisoner had a constitutionally protected 'liberty interest' in security from physical assault by fellow prisoners [J.A.103].

The court of appeals answered that question in the affirmative, primarily on the basis of *Ingraham* and *Youngberg*.

Petitioner asserts, without analysis, that the district court and the court of appeals correctly held that petitioner had "a liberty interest in not being subjected to a physical assault" (Pet. 9). Respondents have consistently disagreed for two reasons. First, the courts below erred as a matter of law in finding a liberty interest under the specific facts of this case. Alternatively, if the courts below correctly held that petitioner had a liberty interest here, that was not the established state of the law at the time of the incident and thus respondents are entitled to a qualified good faith immunity pursuant to the Court's decision in *Harlow v. Fitzgerald*, 457 U.S. 800 (1982). In either event, this Court should affirm the judgment for respondents.

A. The Scope Of A Prisoner's Liberty Interest In Remaining Free From Physical Attack Is Not So Broad As To Encompass A Single Assault By Another Prisoner.

A liberty interest is the "right to be free from, and to obtain judicial relief for, unjustified intrusions on personal security." *Ingraham*, 430 U.S. at 673.* Although the contours of the term "liberty interest" have not been precisely defined, *ibid.*, a liberty interest has "always been thought to encompass freedom from bodily restraint and punishment." *Id.* at 673-674, citing *Rochin v. California*, 342 U.S. 165 (1952). However, prisoners, such as petitioner, "retain only a narrow range of protected liberty interests." *Hewitt v. Helms*, 459 U.S. 460, 103 S.Ct. 864, 869 (1983). A prisoner has a right to be free from direct attack by the prison guards themselves. *Johnson v. Glick*, 481 F.2d 1035 (2d Cir. 1973), *cert. denied*, 414 U.S. 1033 (1973). A pris-

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* Petitioner had the right to seek judicial relief for the assault by suing the person who intentionally assaulted him, fellow-prisoner McMillian.

oner also has been found to have a right to be free from attack by another prisoner where prison officials allegedly stood by while plaintiff was repeatedly attacked without provocation by another inmate wielding a home-made knife, resulting in the loss of sight in one eye. *Curtis v. Everett*, 489 F.2d 526 (3d Cir. 1973), *cert. denied*, 416 U.S. 995 (1974). But there are limits on the scope of a prisoner's right to protection of his bodily integrity against assault by another prisoner.

The court of appeals recognized that the issue was "whether the liberty interest in bodily integrity protected by the Fourteenth Amendment covers the state's failure to prevent attacks by other prisoners . . ." (J.A.104). In answering that question affirmatively the court relied primarily on *Youngberg v. Romeo*, 457 U.S. 307 (1982) (J.A. 105). To rely on *Youngberg* to find a liberty interest here is to disregard the crucial issue of identifying the contours of a liberty interest because the two cases are so very different. First of all, *Youngberg* concerned a patient in a mental hospital, not a state prisoner. Second, Romeo's liberty interest claim was a claim to safe conditions. *Id.* at 315. He was not complaining about a single attack by another patient but about something much more pervasive, namely sustaining injuries on 63 occasions over a two year period as a result of his own violence and that of other patients. The deliberate indifference of the officials in allowing those obviously unsafe conditions to exist for such a long period of time was clear. Consequently, the Court held that since the conditions of which Romeo complained would amount to cruel and unusual punishment in violation of the Eighth Amendment if they occurred in a prison setting, those conditions must, *a fortiori*, be unconsti-

tutional for an involuntarily committed mental patient, who may not be punished at all. *Id.* at 315-316. In the present case, which does concern a prisoner, the district court expressly concluded that there was no Eighth Amendment violation, a conclusion which has never been challenged. In other words, Romeo's liberty interest claim was quite different in nature from the liberty interest claimed by petitioner. Romeo's claim fell within the contours of a protected liberty interest. The question of whether petitioner's claimed liberty interest also falls within those contours certainly cannot be answered by relying on a case as different as *Youngberg*.

Likewise, the question of whether petitioner had a protected liberty interest is not answered by *Ingraham v. Wright*, 430 U.S. 651 (1977), the other case relied on by the district court, directly, and by the court of appeals, indirectly. In *Ingraham* the issues before the Court concerned the use of corporal punishment by school officials on students in public schools. *Id.* at 653. The specific acts were described as follows:

> Ingraham was subjected to more than 20 licks with a paddle while being held over a table in the principal's office. The paddling was so severe that he suffered a hematoma requiring medical attention and keeping him out of school for several days. Andrews was paddled several times for minor infractions. On two occasions he was struck on his arms, once depriving him of the full use of his arm for a week. [*Id.* at 657].

The holding in *Ingraham* is that a public school child has a liberty interest in being free from deliberate restraint and infliction of painful physical punishment by the school officials themselves. That is a far cry from this case. Assuming *arguendo* that lawfully arrested, convicted

and incarcerated state prisoners have the same liberty interest in being free from "unjustified intrusions on bodily integrity" as do public school children, *Ingraham* suggests only that the unjustified intrusion must be a deliberate act by the public officials themselves in order to come within "the contours of this historic liberty interest." This interpretation of *Ingraham* is supported by the Court's reliance on *Rochin v. California*, 342 U.S. 165 (1952). *Rochin*, involved governmental conduct that, in the famous formulation of Mr. Justice Frankfurter, "shocked the conscience." The Court in *Rochin*, like the Court in *Ingraham*, found the contours of a liberty interest to include unjustified intrusions by deliberate acts of government officials themselves. Neither case stands for the broader proposition urged by the courts below, namely that a liberty interest in bodily integrity extends so far as to include a single attack on a prisoner by another prisoner in the absence of participation or acquiescence in the assault by government officials. Indeed, no court before now has ever expanded the contours of a prisoner's liberty interest to encompass such an incident.

Respondents' view is consistent with the Court's interpretation of the Constitution as a charter of negative, not positive, liberties. *See Harris v. McRae*, 448 U.S. 297 (1980). The Bill of Rights was an attempt to ensure the right to be left alone, not the right to receive protective services.

> The Fourteenth Amendment, adopted in 1868 at the height of laissez-faire thinking, sought to protect Americans from oppression by state government, not to secure them basic governmental services. [*Jackson v. City of Joliet*, 715 F.2d 1200, 1203 (7th Cir. 1983), *cert. denied*, — U.S. —, 104 S.Ct. 1325 (1984)].

Cf. Poe v. Ullman, 367 U.S. 497, 543 (1961) (Harlan, J., dissenting) (liberty "includes a freedom from all substantial arbitrary impositions and purposeless restraints").

This focus on negative, not positive, liberties has been disregarded by petitioner and the courts below. Petitioner argues that "[w]hen the state takes a citizen into custody, taking away his power to protect himself, it assumes responsibility for his safety" (J.A.9). Petitioner overstates the matter. He was not merely taken into custody, he was tried, convicted and sentenced to prison. Second, petitioner could have requested protective custody or other protective measures. He did not. Although he reported the threat, he himself did not expect it to be carried out and did not communicate any such expectations to respondents. Should he now be able to claim a liberty interest in being free from assault because he informed the officials of what he himself did not even consider to be a real threat and because he was not protected from that which he did not feel the need to be protected from? Respondents think not. An official's responsibility for a prisoner's safety does not extend that far.

To rule otherwise is literally to open the floodgates to inmate litigation. Here, the prison had a system for dealing with inter-prisoner threats. Assuming that petitioner invoked that system by writing the note, even though he did not anticipate, much less convey an anticipation of, an assault, the system simply did not work perfectly. Given the fallibility of mankind, the state cannot be expected to create and operate a system without any flaws. Furthermore, if the key to a prisoner's success in assert-

ing deprivation of a liberty interest is proof of bodily injury caused by the failure of the officials to protect him after receiving notice of a potential problem, the variations on that theme are endless. For example, suppose a prisoner notices that a bookcase in the prison's law library is unsteady and tottering. He reports that to the librarian, a state official, but the situation is not corrected. Thereafter, the same prisoner is injured when that very bookcase topples over on him. It is difficult to distinguish that case from this one. In fact, in that case the injured prisoner would not even have another person, such as McMillian, whom he could sue. If it is determined that there is a liberty interest here, why would there not be one there? Prison officials would become absolute insurers of the safety of inmates, at least where there is "notice." Surely that was not the intent of the Due Process Clause.

Consequently, respondents urge this Court to decide that at least where (1) the officials did not assault petitioner and (2) the officials did not stand by and watch McMillian assault petitioner and (3) the officials took no affirmative action to encourage McMillian to assault petitioner and (4) respondents in no way acquiesced in the assault and (5) the threat by McMillian against petitioner was ambiguous at best (J.A.120) and (6) the petitioner, although he wrote a note about being threatened, did not expect to be assaulted and conveyed no such expectation to respondents, and (7) the petitioner did not request or seek protective custody or any other protective measures; then petitioner had no right to bodily integrity within the meaning of the word "liberty" in the Due Process Clause.*

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* Another way of analyzing this is to say that the involvement of the officials was so minor that this was not action under color of state law and therefore not cognizable under § 1983.

B. If This Court Now Expands The Contours Of A Protected Liberty Interest To Include Petitioner's Claim, Respondents Are Entitled To Qualified Immunity.

If this Court should now determine that a prisoner's liberty interest includes assault by another inmate when the prison officials do not participate in, encourage or sanction that assault, and despite the fact that the "threat" was ambiguous and not considered a real threat by the petitioner himself, that broad definition of a liberty interest will be announced for the first time. That was not the clearly established law at the time of the incident. Respondents could not reasonably have been expected to anticipate these subsequent legal developments. Accordingly, they are entitled to qualified immunity. *See Harlow v. Fitzgerald*, 457 U.S. 800, 818-819 (1982) ("government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Id.* at 2738).

When respondents claimed qualified immunity in the district court, the court misinterpreted it as a claim of immunity on the grounds that the court, for the first time, was finding liability for mere negligence (J.A.93). That

is not the argument being made here at all. Respondents argue that, regardless of their state of mind, they could not have known that they would be violating petitioner's constitutional rights by failing to take immediate action in response to his note regarding the threat by prisoner McMillian. No prior case would have clearly established a liberty interest under those circumstances. Accordingly, respondents are entitled to qualified immunity.

In conclusion, respondents urge this Court to determine that petitioner had no constitutionally protected liberty interest at stake here. If the Court does find such an interest, it is such an expansion of the contours of a liberty interest as to entitle respondents to qualified immunity. In either event, judgment for respondents should be affirmed.

POINT II

EVEN IF PETITIONER HAD A LIBERTY INTEREST IN BEING FREE FROM A SINGLE ASSAULT BY ANOTHER PRISONER, RESPONDENTS' SIMPLE NEGLIGENCE DID NOT RISE TO THE LEVEL OF DEPRIVING PETITIONER OF THAT INTEREST.

The Fourteenth Amendment provides in pertinent part:

> nor shall any State deprive any person of . . . liberty . . . without due process of law . . . .

The court of appeals, having found that petitioner had a liberty interest within the meaning of the Fourteenth Amendment, held that respondents did not "deprive"

petitioner of that interest because respondents' actions were merely negligent.*

> When the only finding is that of mere negligence, as here, we cannot find the 'outrageousness' or abuse of official power that warrants raising the tortious conduct of the prison official[s] to the level of a deprivation of [a] constitutional right within the scope of §1983 [J.A.120].

Respondents urge this Court to affirm the judgment in their favor for the reason stated above.

Petitioner offers two arguments against affirmance on this ground. First, petitioner argues that "[*i*]*f* negligent loss of a prisoner's property constitutes a Fourteenth Amendment deprivation, certainly negligence causing injury to a prisoner's person constitutes a like deprivation" (Pb10; emphasis supplied). Second, petitioner argues that "[n]othing in any decision of this Court supports the conclusion of the court below that a deprivation of liberty must violate substantive due process to support §1983 relief" when petitioner alleges only a procedural due process violation (Pb13-Pb14). Regarding petitioner's first argument, comparing liberty and property interests, respondents agree that liberty is at least as great an interest as property, but assert further that neither a negligent taking of property nor a negligent taking of liberty constitutes a "deprivation" in the constitutional sense. Regarding petitioner's second argument, respondents agree that there need not be a violation of "substantive

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* This Court may determine that Cannon had no duty to follow up after he "followed the established procedure in directing Davidson to the proper officer" (J.A.120), and thus was not even negligent, a position which respondents have consistently maintained from the outset of this litigation.

due process" to permit recovery under §1983 for an alleged procedural due process violation, but petitioner has misinterpreted the decision below. The court held, instead, that in the absence of a deprivation of a "substantive right" (life, liberty or property), a court does not reach the procedural due process issue. In other words, there cannot be deprivation of liberty without due process if there was no deprivation of liberty at all.

A. Parratt v. Taylor Did Not Hold That Negligence Is Actionable Under 42 U.S.C. § 1983.

It is the position of petitioner, as it was the position of the district court, that *Parratt v. Taylor*, 451 U.S. 527 (1981), concerning the negligent loss of a prisoner's now-famous hobby kit, held that the negligent taking of property under color of state law is actionable under 42 U.S.C. §1983. It follows, petitioner and the district court say, that the negligent taking of liberty under color of state law is actionable under §1983 because liberty is an even greater interest than property. Respondents agree that liberty is at least as great an interest as property, but assert that the premise is faulty; *i.e. Parratt* did not hold that negligence was actionable under §1983.

In *Parratt*, a plurality acknowledged that it had "twice granted certiorari in cases to decide whether mere negligence will support a claim for relief under §1983," *id.* at 532, but each of these cases was decided on other grounds.* Thus, the Court asserted, "We, therefore, once

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* In *Procunier v. Navarette*, 434 U.S. 555 (1978), the Court held that *"regardless of whether the § 1983 complaint framed in terms of negligence stated a claim for relief [or not], the defendants would clearly have been entitled to qualified immunity and therefore not liable for damages."* *Parratt*, 451 U.S. at 533 (referring to *Procunier*; emphasis supplied). In *Baker v. McCollan*, 443 U.S. 137 (1979), the Count found no constitutional right in the first instance.

more put our shoulder to the wheel hoping to be of greater assistance to courts confronting such a fact situation than it appears we have been in the past." *Id.* at 533-534. The Court was helpful, but not in answering the question of whether negligence will support a claim for relief under §1983.

It is true that there is language in *Parratt* which, if taken out of context, may lead to the conclusion that the Supreme Court decided that negligence was actionable under §1983. The Court did say that "[n]othing in the language of §1983 or its legislative history limits the statute solely to intentional deprivations of constitutional rights." *Id.* at 534. (There is a long continuum between intent, referring to an intent to deprive a person of an interest, and negligence; so the absence of an intent requirement is not tantamount to the recognition of an action for mere negligence.) In addition, the Court did say that "the alleged loss, even though negligently caused, amounted to a deprivation." *Id.* at 536-537. However, neither of those statements was necessary to, or a part of, the actual holding in the case. The Court, in its own words, *held* "that the existence of an adequate state remedy to redress property damage inflicted by state officers avoids the conclusion that there has been any constitutional deprivation of property without due process of law within the meaning of the Fourteenth Amendment." *Id.* at 542, citing *Bonner v. Coughlin*, 517 F.2d 1311, 1319 (7th Cir. 1975), *modified en banc*, 545 F.2d 565 (1976), *cert. denied*, 435 U.S. 932 (1978). The existence of an adequate state remedy was readily apparent, and it meant that *even if* there were a deprivation of a property interest, that deprivation was not without procedural due process and therefore not in

violation of the Fourteenth Amendment. The *Parratt* Court did not need to decide the issue of whether negligence was actually sufficient to deprive Taylor of his property interest any more than it needed to decide the issue of whether the prison officials were even negligent at all. Analysis of both issues were bypassed because they simply did not matter, for there could be no constitutional violation anyway because of the existence of the state remedy.

If *Parratt* had held that negligence was actionable, as petitioner asserts, that would have been a long-awaited announcement on an issue of great interest across this country. Surely the Court would have indulged in a more extensive analysis rather than relegate it to dictum. Justice Powell, in his concurring opinion, recognized that when he stated, "[t]he Court passes over a threshhold question —whether a negligent act by a state official that results in loss of, or damage to, property constitutes a deprivation of property for due process purposes." *Id.* at 547. The plurality did not disagree with that. Nor did the plurality disagree with Justice Powell's conclusion that negligence is not actionable. The plurality simply did not reach that issue because it did not need to reach that issue given the existing state remedy that precluded a constitutional violation. *Cf. Hudson v. Palmer*, — U.S. —, 104 S.Ct. 3194, 3205 (1984) (even intentional deprivations of property do not violate the Fourteenth Amendment when the state provides an adequate post-deprivation remedy).

If there had been no adequate state remedy in *Parratt*, or if there had at least been an issue about that (as there is here; see Point III, *infra*); then the Court, having found a property interest, would have been squarely faced

with the question of whether negligence was sufficient to deprive Taylor of a property interest. But those were not the facts of *Parratt*. Now this Court, if it finds that petitioner had a liberty interest, is squarely presented with the question of whether respondents' negligence was sufficient to deprive petitioner of that interest and therefore support his claim for relief under §1983.

B. If Parratt v. Taylor Did Hold That Negligence Is Actionable Under § 1983, That Determination Should Be Disavowed.

The court of appeals based its determination that negligence will not support a claim under §1983 on its view of "the purpose and essence of §1983" (J.A.114). The legislative history of §1983, as reflected in prior decisions of the Court, support the Third Circuit's view, as do recent decisions in many other circuits.

An extensive review of the legislative history of §1983 appears in *Monroe v. Pape*, 365 U.S. 167 (1961). At the conclusion of that review, the Court determined that

> it is abundantly clear that one reason the legislation was passed was to afford a federal right in federal courts because, by reason of prejudice, passion, neglect, intolerance or otherwise, state laws might not be enforced and the claims of citizens to the enjoyment of rights, privileges and immunities guaranteed by the Fourteenth Amendment might be denied by the state agencies. [*Monroe*, 365 U.S. at 180].

It might seem appealing to seize on the word "neglect" and conclude that negligence is cognizable under §1983. However, an analysis of the legislative history of §1983, as set forth in *Monroe* itself, reveals that "neglect" does not refer to "negligence." The legislators who enacted

the Civil Rights Act of which §1983 is a part were concerned about the failure of some states to provide equal protection of the law to all persons. *Monroe*, 365 U.S. at 175. This was not as a result of mere oversight or forgetfulness, typical synonyms for negligence, but because of an inability or unwillingness to enforce a state law. *Id.* at 176. It was this unwillingness that was referred to by the word "neglect." "Negligence," by contrast, "implies that although the actor has subjected the petitioner to unreasonable risk, he did not intend the harm or injury that in fact resulted." *Procunier*, 434 U.S. at 566. Prior to enactment of the Civil Rights Act the offending states *did* intend that certain persons, namely blacks, not receive equal protection of the laws. The states' unwillingness to enforce those laws was more akin to deliberate indifference than negligence.

Consequently, the *Monroe* Court concluded that the essential element of a §1983 action is abuse by a state official of his or her official position. *Monroe*, 365 U.S. at 172. It focuses on the misuse of power. *United States v. Classic*, 313 U.S. 299, 326 (1941).

> That provision was enacted to deter real abuses by state officials in the exercise of governmental powers. It would make no sense to open the federal courts to lawsuits where there has been no affirmative abuse of power, merely a negligent deed by one who happens to be acting under color of state law. [*Parratt*, 451 U.S. at 548-549; Powell, J., concurring].

The question of what type of conduct amounts to abuse of power, and, more particularly, whether negligence can ever rise to that level, "may well not be susceptible of a uniform answer across the entire spectrum of conceivable constitutional violations which might be the subject

of a §1983 action." *Baker v. McCollan*, 443 U.S. 137, 139-140. For example, invidious discriminatory purpose is required to support a claim of racial discrimination under the Equal Protection Clause. *Washington v. Davis*, 426 U.S. 229 (1976). "Deliberate indifference to a prisoner's serious illness or injury" on the part of prison officials is required to support a claim of cruel and unusual punishment under the Eighth Amendment. *Estelle v. Gamble*, 429 U.S. 97 (1976). The issue here is whether mere negligence will support a claim for relief under the Due Process Clause.

The Third Circuit is not alone in determining that negligence does not rise to the level of a constitutional deprivation under the Due Process Clause, even since the decision in *Parratt*. In *Daniels v. Williams*, 748 F.2d 229 (4th Cir. 1984) (*en banc*), *cert. granted*, February 19, 1985, a state prisoner claimed a violation of his liberty interest when he slipped and fell on a pillow and newspapers negligently left on a prison steps by a deputy sheriff. The court found that the facts were "not nearly aggravated enough" to support a claim of a constitutional violation. *Id.* at 230, n.1.

Likewise, in *Hull v. City of Duncanville*, 678 F.2d 582 (5th Cir. 1982), the Fifth Circuit stated:

> To subject a state agency to the federal Section 1983 remedy for deprivation of a federal constitutional or legal right, the conduct of the state officials or employees must be 'sufficiently egregious as to be "constitutionally" tortious.' *Williams v. Kelley*, 624 F.2d 695, 697 (5th Cir. 1980), *cert. denied*, 451 U.S. 1019, 101 S.Ct. 3009, 69 L.Ed.2d 391 (1981) [*Hull*, 678 F.2d at 584].

In *Jackson v. City of Joliet*, 715 F.2d 1200, 1206 (7th Cir. 1983), *cert. denied*, — U.S. —, 104 S.Ct. 1325 (1984), the

Seventh Circuit held that actions of state defendants must be worse than negligent, and even worse than grossly negligent, in order to be actionable under §1983.

Even closer to the facts of the present case is *Wade v. Haynes*, 663 F.2d 778 (8th Cir. 1981), *aff'd on other grounds sub nom. Smith v. Wade*, 461 U.S. 30 (1983). There a state prisoner brought a civil rights action against three correctional officers and proved that he was beaten and sexually assaulted after he was wrongfully placed in an administrative cell with two other prisoners, one of whom the officials knew or should have known had been ordered separated from other inmates for his own safety and the safety of others. *Wade*, 663 F.2d at 780-781. The court concluded that

> there existed sufficient evidence to demonstrate that [the officer] recklessly and with callous indifference placed Wade into a dangerous situation. [*Id.* at 781].

That finding was necessary to sustain a verdict in favor of the prisoner because

> [i]n order to state an eight amendment claim resulting from an attack . . . a prisoner must show that prison officials 'deliberately deprived' him of his constitutional rights. Deliberate deprivation may result from actual intent to deprive him of his rights or from recklessness in ignoring known threats. [*Ibid.*].

In other words, if Wade had only been able to prove negligence, or even gross negligence, on the part of the officers, he would not have stated a claim under the Eighth Amendment. The result should have been no different if Wade had simply restyled his complaint to allege a violation of a liberty interest under the Fifth and Fourteenth Amendments. Likewise, in the present case, where petitioner had

no viable Eighth Amendment claim, "because [respondents] did not act with deliberate or callous indifference to [petitioner's] needs" (J.A.89), he should not be permitted to make an end run around that constitutional requirement by simply phrasing his claim in due process terms and then proving only negligence.

In light of the legislative history of §1983 seeking to protect people from official abuse and in light of determinations by various courts of appeals, even since *Parratt*, that there must be some reckless or deliberate wrongdoing by the defendant to amount to a deprivation under the Due Process Clause, respondents urge this Court to affirm the decision of the court below that negligence, at least in a due process case, is not actionable.*

To decide to the contrary is to disregard the legislative history of §1983, as reflected in prior decisions of the Court, and reasoned opinions of courts of appeals throughout the country. It will make the Fourteenth Amendment a font of tort law, which is precisely what the Court sought to avoid in *Parratt*. *See also Paul v. Davis*, 424 U.S. 693, 701 (1976). Indeed, the very scenario which the *Parratt* Court rejected as a viable §1983 action, namely an automobile accident with a state official, *Parratt*, 451 U.S. at 544, will now become viable if negligence is determined to be actionable. If someone dies, there may be a claim of deprivation of life. If someone is only injured, there may be a claim of deprivation of liberty (freedom from bodily intrusion). If someone's vehicle is damaged, there may

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* Although there is no issue of gross negligence in this case, this Court may wish to clarify that even gross negligence would not support a due process claim under § 1983. That would be consistent with the purpose of § 1983.

be a claim of deprivation of property. Indeed, there may be a claim of deprivation of two or all three of these interests. Furthermore, if the analysis in *Parratt* — that the existence of an adequate state remedy complies with the constitutional requirements of procedural due process — is *not* applicable to life and liberty interests, then the plaintiff in the automobile accident would apparently have a viable §1983 action. Even if the *Parratt* analysis, with respect to the effect of a state remedy on the due process issue, *is* applicable to life and liberty, it cannot be assumed that there will always be an adequate state remedy that will enable a court to dismiss the complaint on that ground; so once again the plaintiff in the automobile accident may have a viable §1983 action. The only way to avoid such an anomalous result is for this Court to clarify that to support a §1983 action under the Due Process Clause, a defendant's conduct must be worse than negligent.

POINT III

EVEN IF THE NEGLIGENCE OF THE STATE PRISON OFFICIALS DID DEPRIVE THE PETITIONER OF A LIBERTY INTEREST, THAT DEPRIVATION WAS NOT WITHOUT PROCEDURAL DUE PROCESS AND THEREFORE DID NOT VIOLATE THE FOURTEENTH AMENDMENT.

> The Fourteenth Amendment does not protect against all deprivations of liberty. It protects only against deprivations of liberty accomplished 'without due process of law.' [*Baker v. McCollan*, 443 U.S. 137, 145 (1979)].

The district court, having found that the prison officials "negligently deprived [petitioner] of his liberty interest in remaining free from physical assault," further

concluded that that deprivation was without procedural due process because "New Jersey provides [petitioner] no process whatsoever by which to pursue a remedy against the state or state officials for injuries inflicted by another prisoner. N.J. Stat. Ann. 59:5-2 (West 1982)." (J.A.91-J.A.92). The court of appeals did not reach the issue of procedural due process because it found no deprivation of a liberty interest in the first instance. Two of the circuit judges, however, in a concurring opinion, while agreeing that there was no deprivation of petitioner's liberty interest, stated that even if the negligence of the prison officials could constitute a deprivation of petitioner's liberty interest, that deprivation was not without procedural due process despite the existence and applicability of N.J. Stat. Ann. 59:5-2 (J.A. 123-J.A.124). That view is in accord with prior decisions of the Supreme Court. Thus, even if this Court determines that the negligence of the prison officials deprived petitioner of a liberty interest, respondents urge affirmance of the decision of the court of appeals because such a deprivation was not without due process of law.

To determine whether the procedural due process requirements of the Constitution have been met, the first question is whether the deprivation of petitioner's liberty interest was authorized by an established state procedure or was the result of random and unauthorized acts by the state employees. *Parratt*, 451 U.S. at 538-541. If the acts of the prison officials were authorized by an established state procedure, due process requires a predeprivation notice and hearing. *Id.* at 538. On the other hand, if the acts were random and unauthorized, so that the state could not predict when the loss would occur, then all that is re-

quired is "some meaningful opportunity subsequent to the initial taking for a determination of rights and liabilities." *Id.* at 541. It is undisputed here that the acts of the two prison officials were not authorized by state procedure. Instead, it is agreed that their acts, or failures to act, were random and unauthorized. They were mere oversights by two individual state employees. Therefore, as in *Parratt*, "[i]t is difficult to conceive of how the state could provide a meaningful hearing before the deprivation takes place." *Parratt*, 451 U.S. at 541. Petitioner concedes as much (Pb22). Thus, the issue is whether there was an adequate post-deprivation remedy to redress the deprivation of petitioner's liberty interest and thus satisfy the due process requirement. *See Parratt*, 451 U.S. at 542, citing with approval *Ingraham v. Wright*, 430 U.S. 651, 682 (1977).

Petitioner argues that because of the immunity provided by N.J. Stat. Ann. 59:5-2(b)(4)* to public entities and public employees for injuries inflicted by one prisoner upon another prisoner, he "does not possess any state claim whatsoever against respondents for the serious injuries that he received as a result of their proven negligence" and, thus, has suffered a deprivation without due process of law (Pb22). Respondents believe that, despite the immunity, the requirements of procedural due process have been met here; so there has been no violation of the Fourteenth Amendment.

Although *Parratt* concerned a deprivation of property, not liberty, the Court's determination — that the existence

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* *N.J. Stat. Ann.* 59:5-2(b)(4) provides:

> Neither a public entity nor a public employee is liable for . . . any injury caused by . . . a prisoner to any other prisoner.

of an adequate state remedy complies with the constitutional requirements of procedural due process — should be equally applicable to deprivations of liberty. Since state action in the deprivation of either of these interests is not complete for constitutional purposes unless the deprivation is without due process, the process available in a state remedy that is deemed adequate would necessarily result in a determination that there was no constitutional violation. Thus, the adequacy of the state remedy is a crucial question.

The burden is on the petitioner to prove that the state remedy is not adequate for procedural due process purposes. *Vicory v. Walton*, 721 F.2d 1062, 1063 (6th Cir. 1983) *reh'g. denied*, 730 F.2d 466 (6th Cir. 1984), *cert. denied*, — U.S. —, 105 S.Ct. 125 (1984) (interpreting *Parratt v. Taylor*, 451 U.S. 527 (1981)). Petitioner concedes as much (Pb23). However, petitioner argues that the existence of the immunity renders the state remedy inadequate without any analysis of that immunity. Surely there is no such *per se* rule. If there were, the Supreme Court would not repeatedly acknowledge, as it has for more than a century, the viability of absolute judicial immunity.

> Few doctrines were more solidly established at common law than the immunity of judges from liability for damages for acts committed within their judicial discretion, as this Court recognized when it adopted the doctrine, in *Bradley v. Fisher*, 13 Wall. 335, 20 L.Ed. 646 (1872). [*Pierson v. Ray*, 386 U.S. 547, 554-555 (1967)].

Indeed, unlike the immunity protecting respondents here, the judicial immunity doctrine is not even limited to negligent conduct. "This immunity applies even when the judge is accused of acting maliciously and corruptly." *Id.* at 554.

There is a sound reason for establishing and preserving judicial immunity. It "is not for the protection or benefit of a malicious or corrupt judge, but for the benefit of the public, whose interest it is that the judges should be at liberty to exercise their functions with independence and without fear of consequences." *Ibid.* (Citations omitted). The Court in *Pierson* expressly held that the enactment of §1983 did not abolish judicial immunity. A similar decision was rendered by the Court in *Tenney v. Brandhove*, 341 U.S. 367 (1951), regarding the immunity of legislators for acts within the legislative role. Consequently, it is clear that an immunity does not automatically violate the Due Process Clause.

Instead, "[t]he touchstone of due process is protection of the individual against arbitrary action of government, *Dent v. West Virginia*, 129 U.S. 114 (1889)." *Wolff v. McDonnell*, 418 U.S. 539, 558 (1974). This Court should decide that if the immunity provided by statute is not arbitrary, then it does not violate due process. Circuit Judges Garth and Weis, in their concurring opinion below, proposed the following balancing test:

> If New Jersey, as it has here, provides immunity against Davidson's claim, then an appropriate due process analysis should be concerned with whether the state's interest in protecting its prison officials in such a situation outweighs Davidson's interest in having available a monetary cause of action against prison officials for merely negligent conduct [J.A.124].

The state has an obvious interest in limiting the tort liability of those who operate the prisons. It has determined that liability should not be imposed upon a prison official whose negligence results in one prisoner assaulting another.

> While it is necessary to provide supervision, the decision to do so for the purpose of preventing inter-prisoner injuries should not be threatened with tort liability nor should the actions of prison guards in reacting to situations which may give rise to such injuries. [Comment, N.J. Stat. Ann. 59:5-2(b)(4)].

The courts should not try to second-guess the legislature's decision to immunize those who, faced with a difficult situation, make a decision which, because of mere forgetfulness, ultimately results in injury. Specifically, Cannon had known petitioner for years. Based on that relationship, he interpreted petitioner's note as not seeking protection, an interpretation confirmed at trial by petitioner himself. As a result Cannon, as Assistant Superintendent, forwarded the note to Internal Affairs and turned his attention to other matters. Should the courts second-guess Cannon's decision or the legislature's determination to protect such decision-making? Similarly James, when he received the note, made the decision to continue with a crisis he was then dealing with, rather than to investigate a note about which, the court found, no urgency had been conveyed. Ultimately, James forgot about the note, but should the courts second-guess his decision about priorities or the legislature's determination to protect priority-setting? The decisions made by Cannon and James are the very types of decisions which prison officials are forced to make innumerable times, day in and day out. If they are not given immunity for these decisions, even when the ultimate result is inter-prisoner injury, there will be a severe chilling effect on their decision-making. So much time will be consumed in analyzing and re-analyzing each decision, important tasks may go undone. Society entrusts the care of prisoners, those who have broken the

law, to prison officials. If the conduct of those officials is no worse than negligent, then an immunity to shield them from liability in order to preserve their ability to run the prison is surely not arbitrary. It is every bit as rational as the even broader immunities that protect judges and legislators and others, and for virtually the same reasons.

Given the rationality of the immunity statute, the balancing of interests must favor the state officials. Thus, as Circuit Judges Garth and Weis concluded, petitioner has had all the process that is due (J.A.126). To hold otherwise is to deprive the states of the right to fashion their own rules of tort law as long as those rules are not arbitrary or irrational.

A similar analysis was used in *Martinez v. California*, 444 U.S. 277, 282 (1980). The Court scrutinized a California statute which provides:

> Neither a public entity nor a public employee is liable for: (a) Any injury resulting from determining whether to parole or release a prisoner or from determining the terms and conditions of his parole or release or from determining whether to revoke his parole or release. [Cal. Gov't. Code Ann. 845.8(a)].

That statute provided the basis for a very similar New Jersey statute that is a subsection of the same section of the New Jersey Tort Claims Act as is the provision involved in the present case.

In *Martinez* a 15 year old girl was murdered by a parolee. Her survivors filed a §1983 action in state court, raising two federal questions. First, they alleged that the statute violated the Fourteenth Amendment because it deprived their decedent of life without due process of law. Such an issue is not before this Court here because pe-

titioner did not challenge the constitutionality of N.J. Stat. Ann. 59:5-2(b)(4), as the court of appeals correctly noted (J.A.121). Nevertheless, the decision of the *Martinez* Court on this issue is instructive. The Court, in rejecting plaintiff's claim, noted that "[t]he statute neither authorized nor immunized the deliberate killing of any human being" but "merely provides a defense to potential state tort law liability." *Id.* at 281. The same is true here. The New Jersey statute does not authorize nor immunize the deliberate killing, or even the deliberate infliction of bodily injury, on another. It merely provides immunity from liability for state employees when, as a result of their negligent conduct, one prisoner assaults another.

The *Martinez* Court acknowledged that the defense in that case "may have encouraged members of the parole board to take somewhat greater risks of recidivism in exercising their authority to release prisoners than they otherwise might," but that was simply a legislative decision that might have an incremental impact on the already existing reality of recidivism. Likewise, the immunity here might arguably encourage prison officials to carry out their duties without stopping to analyze every decision made concerning a prisoner's note about a threat, but that is simply a legislative decision that might have an incremental impact on the already existing reality of assault by prisoners on other prisoners. In rejecting plaintiff's claim that the proper test required a compelling state interest, the Court noted that "the Legislature has broad powers to control governmental tort liability limited only by the rule it not act arbitrarily." *Ibid.*, n.6. Applying a rational relationship test, the Court upheld the constitutionality of the statute. "Whether one agrees or disagrees with Cali-

fornia's decision to provide absolute immunity for parole officials in a case of this kind, one cannot deny that it rationally furthers a policy that reasonable lawmakers may favor." *Id.* at 283.

As noted previously, petitioner has never challenged the constitutionality of the New Jersey statute. However, if he had, it is clear that the statute would have been found to be constitutional. In general, the Supreme Court has historically favored an interpretation of legislation which supports its constitutionality. *Screws v. United States*, 325 U.S. 91, 98 (1945). More specifically, the decision in *Martinez* would support a finding of constitutionality here.

The second federal question addressed by the *Martinez* Court, which parallels the claim here, was whether the actions of the parole official in releasing the murderer deprived decedent of life without due process of law. Since the *Martinez* Court found no deprivation of a life interest in the first instance, the Court expressly did not reach the issue of whether, if there had been a deprivation, that deprivation would have been without due process of law because of the immunity* However, it would be fundamentally inconsistent to rule that a statute is constitutional but denies due process.

Two years after *Martinez*, the determination that a State is free to create substantive defenses or immunities was reaffirmed in *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 432 (1982). Although *Logan* differs from the present case because plaintiff challenged an established

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* For the same reason, this precise issue was raised and not decided in *Daniels v. Williams*, 748 F.2d 229, 232 (4th Cir. 1984) *(en banc)*, *cert. granted*, February 19, 1985, and set for oral argument with this case.

state procedure, not a random act, the Court's analysis of due process requirements is helpful. A civil litigant is not necessarily entitled to a hearing on the merits. *Id.* at 437.

> What the Fourteenth Amendment does require, however, is 'an *opportunity* . . . granted at a meaningful time and in a meaningful manner,' *Armstrong v. Manzo*, 380 U.S. 545, 552, 85 S.Ct. 1187, 1191, 14 L.Ed.2d 62 (1965) (emphasis added) 'for [a] hearing appropriate to the nature of the case,' *Mullane v. Central Hanover Tr. Co., supra*, 339 U.S. at 313, 70 S.Ct. at 656. *Boddie v. Connecticut*, 401 U.S. at 378, 91 S.Ct. at 786. [*Logan*, 455 U.S. at 437].

Petitioner could have filed a tort action against the two prison officials in state court. The fact that he did not avail himself of that opportunity is of no constitutional significance. If he had, the officials would have filed an answer to the complaint, asserting as a separate defense the immunity provided by N.J. Stat. Ann. 59:5-2(b)(4) or, in the alternative, would have filed a motion to dismiss on the basis of that immunity. Ultimately the applicability of the immunity would have been before the state court in a motion to dismiss or a motion for summary judgment. If, as has been found here, the officials were negligent, not guilty of willful or intentional misconduct, then the immunity would apply. Petitioner's complaint would, it is conceded, have been dismissed. Respondents argue that that would have been all the process that was due to petitioner.

Respondents urge this court to adopt the reasoning in *Martinez* and in the concurring opinion below. Since petitioner has never even alleged, much less attempted to prove, that the immunity statute is arbitrary or irrational, petitioner has not sustained his burden of proof that his deprivation was without due process of law. Thus, he has

not established a violation of the Fourteenth Amendment. The judgment in favor of respondents should be affirmed.

CONCLUSION

For all of the foregoing reasons, respondents Joseph Cannon and Robert James submit that the judgment of the Third Circuit should be affirmed.

Respectfully submitted,

IRWIN I. KIMMELMAN
Attorney General Of New Jersey
Attorney for Respondents

Richard J. Hughes Justice Complex
CN 112
Trenton, New Jersey 08625
(609) 633-7089

By: Madeleine Waters Mansier
Deputy Attorney General

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No. 84-6470

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

ROBERT DAVIDSON,

Petitioner,

v.

JOSEPH CANNON and ROBERT JAMES,

Respondents.

ON WRIT OF CERTIORARI TO THE
U.S. COURT OF APPEALS,
THIRD CIRCUIT

BRIEF AMICI CURIAE OF AMERICANS FOR EFFECTIVE LAW ENFORCEMENT, INC. JOINED BY THE INTERNATIONAL ASSOCIATION OF CHIEFS OF POLICE, INC., AND THE NATIONAL SHERIFFS' ASSOCIATION IN SUPPORT OF THE RESPONDENTS

(List of Counsel on Inside Front Cover)

Pandick Midwest, Inc., Chicago • (312) 454-7600

BEST AVAILABLE COPY

Of Counsel:

DANIEL B. HALES, ESQ.
Peterson, Ross, Schloerb
and Seidel
President,
Americans for Effective
Law Enforcement, Inc.
Chicago, Illinois 60601

FRED E. INBAU, ESQ.
John Henry Wigmore
Professor of Law Emeritus
Northwestern University
School of Law
Chicago, Illinois 60611

WILLIAM C. SUMMERS, ESQ.
Supervising Attorney
International Association of
Chiefs of Police, Inc.
13 Firstfield Road
Gaithersburg, Maryland
20878

WAYNE W. SCHMIDT, ESQ.
Executive Director
Americans for Effective
Law Enforcement, Inc.
501 Grandview Drive
Suite 209
South San Francisco
California 94080

COURTNEY A. EVANS, ESQ.
General Counsel
National Sheriffs'
Association
1450 Duke Street
Alexandria, Virginia
22314

JAMES P. MANAK, ESQ.
General Counsel
Americans for Effective
Law Enforcement, Inc.
33 North LaSalle Street
Suite 2108
Chicago,
Counsel for Amici Curiae

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IN THE

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JOSEPH CANNON and ROBERT JAMES,

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ON WRIT OF CERTIORARI TO THE
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BRIEF AMICI CURIAE OF AMERICANS FOR EFFECTIVE LAW ENFORCEMENT, INC. JOINED BY THE INTERNATIONAL ASSOCIATION OF CHIEFS OF POLICE, INC., AND THE NATIONAL SHERIFFS' ASSOCIATION IN SUPPORT OF THE RESPONDENTS

This brief is filed pursuant to Rule 36 of the Supreme Court Rules. Consent to file has been granted by Hon. Irwin I. Kimmelman, Attorney General, State of New Jersey, Counsel for Respondents, and James D. Crawford, Esq., Counsel for Petitioner. Letters of Consent of both parties have been filed with the Clerk of this Court.

INTEREST OF AMICI

Americans for Effective Law Enforcement, Inc. (AELE), as a national not-for-profit citizens organization, is interested in establishing a body of law making the police effort more effective, in a constitutional manner. It seeks to improve the operation of the police function to protect our citizens in their life, liberties and property, within the framework of the various State and Federal Constitutions.

AELE has previously appeared as *amicus curiae* sixty-three times in the Supreme Court of the United States, and thirty-three times in other appellate courts, including the Federal District Courts, the Circuit Courts of Appeal and various state courts, such as the Supreme Courts of California, Illinois, Ohio and Missouri.

The *International Association of Chiefs of Police, Inc.* (IACP), is the largest organization of police executives and line officers in the world, consisting of more than 12,600 members in 62 nations. Through its programs of training, publications, legislative reform, and *amicus curiae* advocacy, it seeks to make the delivery of vital police services more effective, while at the same time protecting the rights of all our citizens.

The *National Sheriffs' Association*, is the largest organization of sheriffs and jail administrators in America, consisting of over 40,000 members. It conducts programs of training, publications, and related educational efforts to raise the standard of professionalism among the Nation's sheriffs and jail administrators. While it is interested in the effective administration of justice in America, it strives to achieve this while respecting the rights guaranteed to all under the Fourteenth Amendment.

Amici well know the problems faced by prison and jail officials in their good faith attempts to conform their conduct to

the requirements of law pertaining to prisoners' rights, and to avoid possible civil liability for themselves and their agencies. The state of this intricate complex of rules compels these organizations to speak on behalf of these officials in this case.

ARGUMENT

I.

THE COURT BELOW CORRECTLY HELD THAT WHILE THE INMATE PLAINTIFF HAD A LIBERTY INTEREST UNDER THE FOURTEENTH AMENDMENT IN BEING SECURE FROM ATTACK BY FELLOW INMATES, THE NEGLIGENCE OF DEFENDANTS BELOW DID NOT AMOUNT TO A VIOLATION OF 42 U.S.C. § 1983.

Americans for Effective Law Enforcement has been privileged to file many *amicus curiae* briefs with this Court. In several of them, as in the present one, it has been joined by the International Association of Chiefs of Police, various state associations of chiefs of police, and the National Sheriffs' Association. Those briefs have presented an analysis of relevant case law and offered suggestions to the Court for decisions that would aid rather than unduly hinder the effective administration of justice without impinging upon basic constitutional protections. In the present brief, we will not undertake an extensive analysis of the case law but will confine our brief to what *amici* believe to be the central issue—do all instances of "simple" negligence on the part of public officials or employees give rise to a violation of 42 U.S.C. § 1983.

The Circuit Court of Appeals held, *Davidson v. O'Lone*, 752 F.2d 817 (3rd Cir. 1984), that the negligent failure of defendants below to protect the inmate plaintiff did not give rise to a claim under 42 U.S.C. § 1983 even though New Jersey law provided no remedy in a state court or administrative proceeding for the inmate plaintiff. *Amici* herein neither believe nor argue that the issue of whether or not "simple" negligence amounts to a violation of 42 U.S.C. § 1983 is dependent upon the availability of a state remedy. Rather, *amici* believe that the availability of a state remedy only comes into play in such an analysis when the taking of property or

impingement of liberty under the Fourteenth Amendment is implicated.

While the recitation of the facts are fully set forth in the briefs of the parties, *amici* believe that a brief summary of what occurred is appropriate for purposes of the argument that we make herein.

Inmate Robert Davidson intervened in a fight between two other inmates at the Luesburg State Prison. One of the inmates involved in the fight (McMillian) threatened Davidson because of Davidson's intervention. Davidson wrote a note reporting the threat and gave it to a guard to give to the prison hearing officer. The prison hearing officer told the guard to pass the note to the proper officials. It was given to the prison's assistant superintendent who in turn gave it to a correctional sergeant. The sergeant ultimately got the note but left the note on his desk while he attended to other matters in the institution.

The note was written on December 19 in the morning and reached Sergeant James at approximately 2:00 p.m. that day. Neither the assistant superintendent nor Sergeant James worked on December 20 or 21. On December 21, Davidson was attacked by the inmate who had made the threat on December 19. In essence, Sergeant James "forgot" about the note.

Finally, as to the facts, inmate Davidson took no other steps to notify the authorities; did not request protective custody; did not foresee or anticipate any attack; and wrote the note to exonerate himself in the event that inmate McMillian started another fight.

In *Parratt v. Taylor*, 451 U.S. 527 (1981), the Court concluded:

> Our decision today is fully consistent with our prior cases. To accept respondent's argument that the conduct of the state officials in this case constituted a violation of the

> Fourteenth Amendment would almost necessarily result in turning every alleged injury which may have been inflicted by a state official acting under "color of law" into a violation of the Fourteenth Amendment cognizable under Section 1983. It is hard to perceive any logical stopping place to such a line of reasoning. Presumably, under this rationale any party who is involved in nothing more than an automobile accident with a state official could allege a constitutional violation under Section 1983. Such reasoning would make of the Fourteenth Amendment a font of tort law to be superimposed upon whatever systems may already be administered by the states. *Paul v. Davis*, 424 U.S. 693, 701 (1976). We do not think that the drafters of the Fourteenth Amendment intended the Amendment to play such a role in our society.

451 U.S. at 544.

42 U.S.C. § 1983 in and of itself does not provide any substantive rights or causes of action; it provides merely the form of remedy. Liability under § 1983 does not attach unless the plaintiff establishes a violation of a substantive federal constitutional or statutory violation. The core element of a § 1983 action has been, is, and should remain, abuse by a public official or employee of his or her position where the abuse amounts to violation of a federal constitutional or statutory provision.

While there has been considerable confusion and disagreement among the courts as to the scope of § 1983 liability where the substantive issue involved is what is in essence traditional concepts of common law negligence, *amici* herein submit that the better reasoned view is that traditional common law negligence is not actionable under § 1983 absent an allegation or proof of abuse by a public official or employee and further where such abuse violates a constitutional provision or a federal statute.[1]

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[1] See *Maine v. Thiboutot*, 448 U.S. 1, 4 (1980).

Amici herein suggest that the Court's opinions over the last several years on this admittedly troublesome issue from both the legal and policy perspectives mandate such a result.

In *Baker v. McCollan*, 443 U.S. 137 (1979), the Court held that mistaken identification by police officers which led to the arrest of the wrong person did not deprive the plaintiff of any rights secured by the Constitution. The initial teaching of *Baker, supra*, was clear—actions by public officials or employees that involve a mistake or error (i.e.,—"simple negligence") do not state a claim under § 1983 since the conduct therein did not rise to the level of a constitutional violation, absent abuse, intent, a state of mind, or conduct which could be characterized as deliberate indifference or disregard.

In *Parratt v. Taylor*, 451 U.S. 527 (1981), the Court held that the negligent taking of a prisoner's property as a result of a random and unauthorized act by a state employee acting under color of law did not amount to a deprivation of property within the context of the Fourteenth Amendment (i.e., without due process of law) since the state provided a post-deprivation remedy.

The Court's holding in *Parratt, supra*, was subsequently extended to intentional deprivations of property in *Hudson v. Palmer*, ____ U.S. ____, 104 S.Ct. 3194 (1984). The "window" that has remained open is the appropriate standard for Section 1983 liability where a deprivation of liberty without due process of law is involved. The United States Court of Appeals for the First Circuit recently described the dilemma as:

> . . . the determination whether simple or gross negligence applies, and its implications for this case are shrouded in the mists that presently envelop this area of the law. But, acting by such lights as are available, we do not believe that an actor as remote from the primary civil rights violation as Wheeler is to be held liable under Section 1983.

Voutour v. Vitale, et al., 761 F.2d 812 at 818 (1st Cir. 1985).

The Court in the case at bar has the opportunity to dissipate "the mists that presently envelop this area of the law."

The view that *amici* herein urge is consistent with the emerging jurisprudence from the Circuit Courts of Appeal on closely related matters, as exemplified by the following cases:

1. *Daniels v. Williams*, 748 F.2d 229 (4th Cir. *en banc*, 1984), cert. granted, 53 LW 3626, holding in part that "simple" negligence does not state a claim under § 1983, and *Voutour v. Vitale, et al.*, 761 F.2d 812 (1st Cir. 1985), holding that "simple" negligence in the shooting of a citizen by a police officer likewise does not state a claim under § 1983;

2. *Gunther v. Holmgreen, et al.*, 738 F.2d 879 (7th Cir. 1984) and *Thibodeaux v. Borderlon, et al.*, 740 F.2d 329 (5th Cir. 1984), holding that the availability of state tort remedies precludes claims under § 1983 for what would normally be considered common law "intentional" torts; and

3. *Oklahoma City v. Tuttle*, ____ U.S. ____, 105 S.Ct. 2427 (1985); *Languirand v. Hayden*, 717 F.2d 220 (5th Cir. 1983); *Hays v. Jefferson County*, 668 F.2d 869 (6th Cir. 1982), and *Herrera v. Valentine*, 653 F.2d 1220 (8th Cir. 1981), all holding that at least gross negligence amounting to deliberate indifference must be proven in order for a municipality to be liable under § 1983 for a failure to train. The training must be so reckless or grossly negligent that future police misconduct is inevitable.

Amici urge the Court to adopt the view of the Circuit Court of Appeals below, to wit: "A construction that § 1983 does not encompass negligence actions does not restrict its function as the primary vehicle to provide redress for unconstitutional action by state employees that violates the Constitution. . . " 752 F.2d 817 at 827.

Amici submit that § 1983 should fulfill only its intended purpose—as the primary vehicle by which individuals have

recourse against public officials and employees who, while acting under color of law, deprive individuals of rights, privileges and immunities guaranteed by federal constitutional and statutory law. *Amici* respectfully submit that not every "mistake" made by a public official or employee in the course of their duties is of constitutional magnitude so as to be actionable under § 1983. To so hold would truly, as Justice Rehnquist stated, allow § 1983 to be used as a "font" of tort law to be superimposed over traditional concepts of state tort jurisprudence which was not intended by the drafters of the Fourteenth Amendment.

CONCLUSION

Amici respectfully submit that the ruling of the court below is consistent with prior holdings of this Court, and should be affirmed with a clear statement that irrespective of the interest involved simple negligence is not a basis for the assessment of damages under 42 U.S.C. § 1983.

Respectfully submitted,

Of Counsel:

DANIEL B. HALES, ESQ.
Peterson, Ross, Schloerb
and Seidel
President,
Americans for Effective
Law Enforcement, Inc.
Chicago, Illinois 60601

FRED E. INBAU, ESQ.
John Henry Wigmore
Professor of Law Emeritus
Northwestern University
School of Law
Chicago, Illinois 60611

WILLIAM C. SUMMERS, ESQ.
Supervising Attorney
International Association of
Chiefs of Police, Inc.
13 Firstfield Road
Gaithersburg, Maryland
20878

WAYNE W. SCHMIDT, ESQ.
Executive Director
Americans for Effective
Law Enforcement, Inc.
501 Grandview Drive
Suite 209
South San Francisco
California 94080

COURTNEY A. EVANS, ESQ.
General Counsel
National Sheriffs'
Association
1450 Duke Street
Alexandria, Virginia
22314

JAMES P. MANAK, ESQ.
General Counsel
Americans for Effective
Law Enforcement, Inc.
33 North LaSalle Street
Suite 2108
Chicago,
Counsel for Amici Curiae

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENTS

CHARLES FRIED
Acting Solicitor General

RICHARD K. WILLARD
Acting Assistant Attorney General

KENNETH S. GELLER
Deputy Solicitor General

CHARLES A. ROTHFELD
Assistant to the Solicitor General

BARBARA L. HERWIG
DOUGLAS N. LETTER
Attorneys

Department of Justice
Washington, D.C. 20530
(202) 633-2217

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QUESTION PRESENTED

Whether petitioner was deprived of liberty without due process of law when state officials' negligence resulted in an injury to his person and state law bars a tort action against either the officials or the state.

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In the Supreme Court of the United States

OCTOBER TERM, 1985

No. 84-6470

ROBERT DAVIDSON, PETITIONER

v.

JOSEPH CANNON, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENTS

INTEREST OF THE UNITED STATES

This case concerns the liability under 42 U.S.C. 1983 of individual state officials whose allegedly negligent acts injured a state prisoner in a jurisdiction that bars the prisoner from bringing a tort action against either the state itself or the officials. Under *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), federal officials may be held liable in many of the same circumstances in which state officials are liable under Section 1983. In addition, the Federal Tort Claims Act, 28 U.S.C. 1346(b) and 2671 *et seq.*, precludes tort actions against the government for certain tortious acts by government employees. Since the Court's decision may affect the extent to which federal officials may be held

personally liable for acts committed in the course of their employment, the United States has a clear interest in this case.

STATEMENT

1. Petitioner was an inmate at the New Jersey State Prison at Leesburg. On December 19, 1980, he sent a note to respondent Cannon, the assistant superintendent of the prison, in which he said that another inmate, McMillian, had threatened to harm petitioner. Cannon read the note and referred it to respondent James, a Corrections Sergeant. Cannon subsequently testified that he did not regard the situation as urgent because he knew petitioner personally and on previous occasions when petitioner had a serious problem he had contacted Cannon directly. J.A. 98-99, 120.

James received the note at approximately 2:00 p.m. He did not read it but left it on his desk while he attended to other matters—for example, a report that an inmate had a knife in his cell and a problem with an inmate who appeared to be having a mental breakdown. J.A. 99. When James left the institution at 10:30 p.m., he forgot the note. Neither Cannon nor James worked on December 20 or 21; on December 21, McMillian attacked petitioner with a fork, breaking his nose and inflicting other wounds. Petitioner took no steps, other than writing the note, to alert the authorities that he feared an attack; he testified that he did not foresee the attack but wrote the note to exonerate himself in case McMillian started a fight. *Ibid.*

2. Petitioner sued respondents under 42 U.S.C. 1983 in the United States District Court for the District of New Jersey. Petitioner claimed that respondents were liable in damages because they deprived him of liberty without due process of law in violation of the Due Process Clause of the Fourteenth Amendment. After a trial, the district court ruled that "the assault here implicates a 'liberty interest' protected by the due process clause"

because "[f]reedom from physical attack and injury undeniably falls within the compass of constitutionally protected liberty" (J.A. 89).

The district court then turned to the question whether respondents could be said to have "deprived" petitioner of this liberty interest within the meaning of the Due Process Clause. The court found that respondents "did not act with deliberate or callous indifference to [petitioner's] needs" (J.A. 89). But the court also found that respondents "negligently failed to take reasonable steps to protect [petitioner], and that he was injured as a result" (*ibid.*). The district court ruled that under this Court's decision in *Parratt* v. *Taylor*, 451 U.S. 527 (1981), "a state official's negligence is sufficient to constitute a 'deprivation' for due process purposes." J.A. 91.

The district court noted that New Jersey law provides that "[n]either a public entity nor a public employee is liable for * * * any injury caused by * * * a prisoner to any other prisoner." N.J. Stat. Ann. § 59.5-2(b)(4) (West 1982). The court concluded that since "New Jersey provides [petitioner] no process whatsoever by which to pursue a remedy against the state or state officials" (J.A. 91-92), it cannot be said to have provided the process that is "due" under the Fourteenth Amendment.[1] The district court therefore concluded that in view of petitioner's physical injuries, "an award of $2,000.00 in compensatory damages is an appropriate judgment" (J.A. 93) and it entered judgment in that amount against respondents.

3. The court of appeals, hearing the case en banc, reversed. The court of appeals ruled that the district

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[1] The district court also rejected respondents' argument that petitioner's claim was barred by qualified immunity. The court did not dispute that respondents might have been unaware that they could be held liable under Section 1983 for negligent action, but it reasoned that such unawareness "obviously could not have influenced their actions" because "negligence is by its nature unintentional" (J.A. 93).

court was not clearly erroneous in finding that respondents were negligent (J.A. 102). The court of appeals also concluded that the attack on petitioner implicated a liberty interest protected by the Due Process Clause (*id.* at 102-105).

The court of appeals did not agree, however, with the district court's conclusion that respondents' negligent action constituted a "deprivation" within the meaning of the Due Process Clause. The court of appeals first reviewed a series of this Court's decisions—*Monroe* v. *Pape*, 365 U.S. 167 (1961); *Estelle* v. *Gamble*, 429 U.S. 97 (1976); *Paul* v. *Davis*, 424 U.S. 693 (1976); *Screws* v. *United States*, 325 U.S. 91 (1945); *Procunier* v. *Navarette*, 434 U.S. 555 (1978); and *Baker* v. *McCollan*, 443 U.S. 137 (1979)—and concluded that "nothing in th[is] Court's cases through 1979 provides any support for the principle that negligent conduct by a state official causing injury to the person constitutes a deprivation of a Fourteenth Amendment right which can be redressed in a § 1983 suit." J.A. 111.

The court of appeals then considered *Parratt* v. *Taylor*, *supra*. The court acknowledged that certain "language [in *Parratt*] standing alone is susceptible of the interpretation placed upon it by the district court that mere negligence can constitute a deprivation that can be redressed in a § 1983 action" (J.A. 113). But the court of appeals stated that "in the context of the development of the law" that it previously had discussed, "we conclude [that] *Parratt* does not so hold" (*ibid.*). The court of appeals reasoned that *Parratt* could not have been intended to overturn this Court's prior decisions that "vigorously rejected the suggestion that traditional torts bec[o]me constitutional violations when committed by state officials" (J.A. 113). While the court of appeals "eschew[ed] prescribing a comprehensive litmus test to determine which actions are or are not within § 1983" (*id.* at 116), it noted that "[t]he essential element of a § 1983 action is abuse by a state official of his or her

official position" (*id.* at 115) and concluded that Section 1983 "does not extend to providing a remedy for the type of negligence found in this case" (*id.* at 120; footnote omitted). The court of appeals accordingly ruled that petitioner had failed to make out a violation of either his procedural or his substantive due process rights (see *id.* at 120, 121-122).

Judges Garth and Weis joined the opinion of the court of appeals but emphasized in a concurring opinion that "even if mere negligence could constitute a deprivation of [petitioner's] liberty interest * * *, there is no requirement or reason that a remedy must be provided by [Section] 1983 in federal court. * * * Just because no remedy is available to [petitioner] under state law, it does not follow that *some* remedy must be made available *somewhere*" (J.A. 123 (emphasis in original)). The concurring opinion remarked that "an appropriate due process analysis should be concerned with whether the state's interest in protecting its prison officials" from a tort action arising out of a claim like petitioner's "outweighs [petitioner's] interest in having available a monetary cause of action against prison officials for merely negligent conduct" (*id.* at 124). Judges Garth and Weis concluded that because of "the state's strong interest in protecting its prison officials from liability, * * * the balance [must be] struck in favor of the state" (*id.* at 126).

Judge Seitz dissented on the ground that language in this Court's opinion in *Parratt* precluded the court of appeals from holding that negligent action does not constitute a deprivation within the meaning of the Due Process Clause (J.A. 127-132). But Judge Seitz noted that Justice Powell's concurring opinion in *Parratt* had urged that a negligent action could not constitute a deprivation, and he stated that "there is much to be said for Justice Powell's opinion, which 'would avoid trivializing the right of action provided in § 1983'" (*id.* at 131 (quoting 451 U.S. at 549)). Judge Gibbons

also dissented (J.A. 132-172), contending that "no body politic calling itself humane should assert that custodians of the involuntarily committed may be relieved of the duty to take reasonable care to prevent harm from befalling their charges" (*id.* at 133; footnote omitted). Judge Higginbotham dissented "for the substantive reasons stated in the opinions of Judges Seitz and Gibbons" (*id.* at 172).

INTRODUCTION AND SUMMARY OF ARGUMENT

A. Petitioner's argument is straightforward. The state's negligence, he asserts, has denied him "liberty." The state also has not offered him a remedy for its wrong. Therefore, he concludes, the state has deprived him of liberty without due process. But petitioner's assertion cannot be taken at face value. Because of the extensive nature of sovereign and official immunities, individuals injured by the negligence of government employees often find themselves without a tort remedy. The Court never has suggested that such circumstances are constitutionally impermissible. Petitioner's argument thus necessarily is wrong.

1. In our view, a central flaw in petitioner's contention is its assumption that a negligent act by a state official can give rise to a constitutional "deprivation." We recognize that petitioner's assumption finds some support in language in *Parratt* v. *Taylor*, 451 U.S. 527 (1981). But *Parratt* does not settle the issue; the Court there was focusing on the state of mind necessary to make out a violation of 42 U.S.C. 1983 (rather than of the Due Process Clause), and its brief comments on "negligent deprivations" were unnecessary to its holding that the *Parratt* plaintiff had *not* been denied due process. Moreover, it is plain that petitioner's proposition is inconsistent with the language and purposes of the Due Process Clause, and with the decisions of this Court that have defined the relationship between that Clause and the common law.

As Justice Powell noted while concurring in the result in *Parratt* (451 U.S. at 548), the term "deprivation" generally connotes an intentional act. And the Due Process Clause has, historically, been applied only to deliberate decisions by government officials that deprived persons of liberty or property. From the origin of the due process concept in the Magna Carta through this Court's most recent decisions construing the Due Process Clause, its guarantee of procedural regularity has served to protect individuals against oppressive or arbitrary misuse of government power. When a state official inflicts a negligent injury, however, the authority of government is brought to bear against the individual in a far more oblique and less threatening way; to view the Due Process Clause as a protection against such conduct is to trivialize its historic role.

2. If the Court were to accept petitioner's invitation to apply procedural due process to negligent "deprivations," it accordingly would have to undertake a radical redefinition of the purposes of the Due Process Clause. Traditionally, the Clause has guaranteed that one faced with a deprivation will receive a fair hearing, so that the state can determine whether the contemplated deprivation is justified—a purpose, of course, that presupposes knowing or systematic state conduct. But the guarantee of due process never has been held to mean that the state cannot err, or that for every wrong there must be a remedy.

Petitioner, however, envisions an entirely different role for procedural due process. He complains only that he suffered an injury that can be traced to the state's error. He argues that the Due Process Clause makes that error unconstitutional because the state has no mechanism for correcting its mistake. He therefore insists that the guarantee of procedural due process grants him a *substantive* right to recover damages for his injury. His assertion, then, is that the Due Process Clause directs the courts to fashion a federal law of torts—but to do so

interstitially, to cover fortuitous gaps in state tort law. Petitioner's contention thus runs afoul of a proposition that repeatedly has been propounded by this Court: that the Due Process Clause serves purposes distinct from the purposes of the common law of torts.

3. That petitioner's position cannot be reconciled with this Court's rulings on the role of procedural due process is not surprising: his claim, at bottom, is not a procedural one at all. Procedural claims relate, of course, to the procedures that must accompany—and that make permissible—deprivations of life, liberty, or property. But it is nonsensical to talk about petitioner's claim in those terms. A state official could not have inflicted upon petitioner the injuries that he suffered (or caused him to be so injured) on any showing under the most rigorous procedures; doing so would violate the constitutional prescriptions imposed by the Eighth Amendment or by the *substantive* component of the Due Process Clause.

Petitioner's claim therefore must be grounded on substantive due process. As such, it cannot prevail. The simple negligence he alleges plainly does not involve a deliberate infliction of serious injury of the sort that has been found to infringe on substantive constitutional guarantees. Cf. *Rochin* v. *California*, 342 U.S. 165, 172 (1952). And this conclusion points up the basic anomaly in petitioner's position. By insisting that every injury to person or property gives rise to a procedural due process claim (so long as it is not remediable in a state tort suit), he is attempting to convert a hopeless substantive claim into a live procedural one. In the process, he is distorting the meaning of the Clause as a whole.

B. Petitioner cannot prevail even if he is granted all of the dubious premises discussed above: even if he was deprived of liberty, he was not denied due process simply because the state's tort rules preclude him from obtaining a damages award for that deprivation. States have exceedingly wide latitude to fashion substantive or pro-

cedural rules of tort law, even if on occasion such rules may make it impossible for injured persons to obtain redress in damages. Determining whether these rules comport with due process requires an inquiry into the magnitude of the private interest in maintaining suit as measured against the interest served by the state provision at issue. See, *e.g.*, *Logan* v. *Zimmerman Brush Co.*, 455 U.S. 422 (1982); *Mathews* v. *Eldridge*, 424 U.S. 319 (1976). And as repeated holdings by this Court demonstrate, official immunity rules have long been understood to further important public policies. See, *e.g.*, *Butz* v. *Economou*, 438 U.S. 478, 495 (1978); *Pierson* v. *Ray*, 386 U.S. 547 (1967). A procedural system that makes use of such rules therefore cannot, for that reason alone, be deemed fundamentally unfair.

ARGUMENT

I. A NEGLIGENT INFRINGEMENT OF A LIBERTY INTEREST DOES NOT CONSTITUTE A "DEPRIVATION" OF LIBERTY WITHIN THE MEANING OF THE DUE PROCESS CLAUSE

A. Petitioner's Argument Reads The Due Process Clause As Creating A Remedy For All Tortious Injuries

1. Petitioner's argument is straightforward and superficially alluring. His interest in freedom from personal injury is, petitioner contends, a "liberty" interest protected by the Due Process Clause of the Fourteenth Amendment. The courts below agreed that the negligence of respondents, who are state officials, caused that interest to be invaded. A negligent act that has such an effect, petitioner asserts, constitutes a "deprivation" of liberty within the meaning of the Due Process Clause. Since the state provides him no tort remedy, that deprivation, petitioner further contends, occurred without "due process of law." Therefore, petitioner concludes, his rights under the Due Process Clause of the Fourteenth Amendment have been violated.

Several of the steps of this syllogism are subject to substantial doubt. But more important, its conclusion cannot possibly be correct. If petitioner's reasoning were valid, almost any negligent tort committed by a state official acting within the scope of his authority could, depending upon the vagaries of state tort law, constitute an actionable "deprivation" of "liberty" or "property." If, for example, a government employee driving an automobile on official business negligently caused injury to the automobile and person of another, under petitioner's reasoning the injured party would have been "deprived" of both property and liberty. Yet the Court has noted the "'constitutional shoals' that confront any attempt to derive from congressional civil rights statutes a body of general federal tort law, *Griffin* v. *Breckinridge*, 403 U.S. 88, 101-102 (1971); *a fortiori*, the procedural guarantees of the Due Process Clause cannot be the source for such law." *Paul* v. *Davis*, 424 U.S. 693, 701 (1976). Indeed, in *Paul* the Court thought it obvious that the Due Process Clause should not be interpreted in a way that would permit "the survivors of an innocent bystander mistakenly shot by a policeman or negligently killed by a sheriff driving a government vehicle [to present] * * * claims cognizable under § 1983" (424 U.S. at 698); the Court in *Paul* rejected a Section 1983 claim based on the Due Process Clause in part because it saw no principled way of allowing that claim without also permitting a Section 1983 claim by any person injured by a government employee's tortious act.

2. Petitioner's answer to this anomaly in his argument is that his claim is based not only on respondents' negligence but also on New Jersey's failure to provide a tort remedy, against either the state or respondents, for that negligence. See Pet. Br. 16-17. Petitioner thus contends that the Due Process Clause is not violated by a government employee's negligence alone but *is* violated when that negligence cannot, under state law, be redressed by an action in tort. Cf. *Parratt* v. *Taylor*, 451

U.S. 527, 550-551 n.8 (1981) (Powell, J., concurring in the result). In short, petitioner suggests that, under the Due Process Clause, a remedy must be provided for every injury to person or property that ultimately may be traced to a state actor. But this contention, too, is implausible. To the contrary, in *Parratt*—the decision on which petitioner primarily relies—the Court condemned as simplistic and ahistorical the proposition that no loss should "go without redress," noting that the validity of any claim must turn on "the complex interplay of the Constitution, statutes, and the facts." 451 U.S. at 531-532.

That the Court reached such a conclusion is hardly surprising. Because of the extensive nature of sovereign and official immunities, individuals injured by the actions of government employees frequently find themselves without a tort remedy against either the employee or the government.[2] Many federal and state employees are, and long have been, wholly or qualifiedly immune from suit for acts committed in the course of their employment (including, in many cases, acts that are tortious). See, *e.g.*, *Mitchell* v. *Forsyth*, No. 84-335 (June 19, 1985), slip op. 18; *Harlow* v. *Fitzgerald*, 457 U.S. 800, 807-808 (1982); *Butz* v. *Economou*, 438 U.S. 478, 495 (1978); *Stump* v. *Sparkman*, 435 U.S. 349 (1978); *Procunier* v. *Navarette*, 434 U.S. 555, 561 (1978); *Pierson* v. *Ray*, 386 U.S. 547 (1967); *Howard* v. *Lyons*, 360 U.S. 593 (1959); *Barr* v. *Matteo*, 360 U.S. 564 (1959); *Spalding* v. *Vilas*, 161 U.S. 483 (1896); *Kendall* v. *Stokes*, 44 U.S. (3 How.) 87 (1845); *Beaty* v. *Perkins*, 6 Wend. 382 (N.Y. Sup. Ct. 1831). See also *Owen* v. *City of Independence*, 445 U.S. 622, 637-638 (1980); James, *Tort Liability of Governmental Units and Their Officers*, 22

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[2] Indeed, even apart from immunity rules, a great many statutes and common law strictures make it impossible for plaintiffs to recover for negligent injuries caused by state actors.

U. Chi. L. Rev. 610, 640-641 & nn.184-186, 644-645 (1955) (citing cases). And historically, all tort suits against state and federal governments were barred by sovereign immunity. State tort claims acts, to the extent they exist, are a recent innovation,[3] and the Federal Tort Claims Act, 28 U.S.C. 1346(b) and 2671 *et seq.*, was not enacted until 1946 (Act of Aug. 2, 1946, ch. 753, Tit. IV, 60 Stat. 842 *et seq.*). Moreover, the Federal Tort Claims Act does not by any means permit all suits for negligence; it contains numerous exceptions. See 28 U.S.C. 2680. Several of these exceptions—in particular, the limitation on liability for the performance of a "discretionary function" (28 U.S.C. 2680(a))—immunize the government from suit in a wide category of cases in which individual employees also are immune.[4]

Consequently, the situation in which petitioner finds himself—he has been injured by the negligence of a government employee but, because of sovereign and official immunities, is without a tort remedy—is commonplace. To agree with petitioner that this state of affairs amounts to a violation of due process, the Court would have to question the constitutionality either of sovereign immunity or of government employees' immunities from

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[3] A study of state waivers of sovereign immunity published in 1954 concluded: "The principal fact to be noted * * * is that few states have very fully broken away from the immunity rule." Leflar & Kantrowitz, *Tort Liability of the States*, 29 N.Y.U.L. Rev. 1363, 1363.

[4] See *Developments in the Law: Remedies Against the United States and Its Officials*, 70 Harv. L. Rev. 827, 838 (1957) (footnotes omitted):

> The Federal Tort Claims Act has removed some of the immunity of the Government to suits for injuries caused by its agents, but the consent to suit in this act does not extend to harms caused through discretionary action of government officers. Since that is precisely the area in which officers are most protected by personal immunity, the result is that persons injured through wrongful discretionary action have no judicial remedy.

common law tort actions. But the suggestion that the states and the federal government are constitutionally obligated to enact tort claims statutes—indeed, to enact such statutes with no exceptions—is wholly novel. See generally *Kawananakoa* v. *Polyblank*, 205 U.S. 349, 353 (1907) (Holmes, J.); *Cohens* v. *Virginia*, 19 U.S. (6 Wheat.) 264, 411, 412 (1821). And the Court itself has been largely responsible for creating official immunities.

In fact, the Court never has suggested that a predicament like petitioner's is constitutionally impermissible. It has declined to recognize a federal right of action for an injured party whose tort law remedy against a state officer was foreclosed by an immunity statute. *Martinez* v. *California*, 444 U.S. 277, 282 (1980). And it has affirmed the power of states to "create substantive defenses or immunities for use in adjudication" (*Logan* v. *Zimmerman Brush Co.*, 455 U.S. 422, 432 (1982)) without suggesting that the withdrawal of certain injuries from the reach of state tort law makes them remediable in federal court. See *Martinez*, 444 U.S. at 282. Cf. *Ferri* v. *Ackerman*, 444 U.S. 193, 198 (1979). It follows that the conclusion reached by petitioner's reasoning—that the Due Process Clause is violated when state employees act negligently and no tort remedy is available—is necessarily wrong, and that at least one of the premises of petitioner's syllogism must be incorrect.

B. The Due Process Clause Is Not Directed At Negligent Acts

In our view, a central error in petitioner's argument is its assumption that a negligent act by a state official that invades a liberty or property interest constitutes a "deprivation" of such an interest within the meaning of the Due Process Clause.[5] Like the court of appeals,

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[5] Although it might plausibly be argued that no "liberty" interest is invaded by an isolated negligent act (compare *Youngberg* v. *Romeo*, 457 U.S. 307, 315-316 (1982), and *Ingraham* v. *Wright*, 430

we recognize that petitioner's assumption finds some support in language in *Parratt* v. *Taylor*, *supra*. But petitioner is incorrect in asserting that *Parratt* definitively resolved the issue, and petitioner's contention on the merits is inconsistent with the language and purposes of the Due Process Clause and with the decisions of this Court that have defined the relationship between that Clause and the common law.

1. In *Parratt*, a state prisoner who asserted that prison officials negligently lost his property brought suit against the officials under 42 U.S.C. 1983, claiming that he had been deprived of property without due process. This Court rejected his claim, ruling that a post-deprivation tort remedy against the state was sufficient "process." In the course of reaching this conclusion, the Court remarked that "the alleged loss, even though negligently caused, amounted to a deprivation" (451 U.S. at 536-537 (footnote omitted))—the statement from which petitioner draws the bulk of his argument.

In fact, however, the Court's focus in *Parratt* was not on the Due Process Clause; it granted certiorari (as it had twice previously) to consider the separate question whether "mere negligence will support a claim for relief under [*Section*] *1983*" (451 U.S. at 532 (emphasis added)). The Court's discussion relating to the defendant's state of mind—which led to the conclusion that "*the statute* [is not directed] solely to intentional deprivations of constitutional rights" (*id.* at 534 (emphasis

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U.S. 651, 673-674 (1977)), our discussion in this brief is confined to the question whether the kind of official actions at issue here could have effected a "deprivation" within the meaning of the Due Process Clause. We therefore assume arguendo that a liberty interest was implicated by respondents' actions.

[6] This conclusion means only that Section 1983 does not add an intent requirement of its own; a plaintiff proceeding under the statute still must prove a constitutional violation, including the state of mind demanded by the provision of the Constitution at issue. Cf. *Baker* v. *McCollan*, 443 U.S. 137, 140 (1979).

added))[6]—therefore focused entirely on the language, legislative history, and prior interpretations of Section 1983. See *id.* at 534-535, 541-542. In contrast, the Court's statement that negligence may give rise to a due process "deprivation" was confined to one sentence offered in passing. *Id.* at 536-537.

That sentence was, moreover, unnecessary to the Court's holding that the prisoner received due process even if he was deprived of property. For a number of reasons, we believe it should be viewed only as a statement that the Court was assuming arguendo that the negligently-inflicted loss was a deprivation. We note that Justice Stewart, who joined in the Court's opinion, understood it in this way. See 451 U.S. at 544-545. Justice Powell, who concurred separately, likewise observed that the Court had "passe[d] over [the] threshold question—whether a negligent act by a state official that results in loss of or damage to property constitutes a deprivation of property for due process purposes." *Id.* at 547 (footnote omitted).

Furthermore, the conclusion that a negligent action can constitute a deprivation is, as the court of appeals noted and as we explain below (pages 24-26, *infra*), difficult to reconcile with several of this Court's previous decisions—*Paul*, *Martinez*, and *Baker* v. *McCollan*, 443 U.S. 137 (1979). It seems unlikely that the Court intended to depart from the direction marked out by those cases in brief dictum unsupported by any reasoning. Thus, several courts of appeals, like the court below, have read *Parratt* as leaving the question open and have declined to hold that a negligent act that results in a loss of liberty or property is a "deprivation" for purposes of due process.[7] We therefore believe that it is appropriate

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[7] See, *e.g.*, *Rankin* v. *City of Wichita Falls*, 762 F.2d 444, 447-448 (5th Cir. 1985); *Jackson* v. *City of Joliet*, 715 F.2d 1200, 1203-1206 (7th Cir. 1983); *Hull* v. *City of Duncanville*, 678 F.2d 582 (5th Cir. 1982); *Mills* v. *Smith*, 656 F.2d 337, 340 n.2 (8th Cir. 1981). See also *Daniels* v. *Williams*, 748 F.2d 229, 231-232

to address anew the question whether the negligent act of a state official can give rise to a potentially actionable "deprivation" of liberty or property under the Due Process Clause.

2. Section 1 of the Fourteenth Amendment provides in part: "[N]or shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." As Justice Powell noted in his concurring opinion in *Parratt*, the most natural reading of the language "nor shall any State deprive" would limit it to deliberate actions by state officials calculated to take away life, liberty, or property from an individual. "[A] 'deprivation' connotes an intentional act denying something to someone, or, at the very least, a deliberate decision not to act to prevent a loss." 451 U.S. at 548 (footnote omitted). See *id.* at 548 n.4, quoting *Webster's New International Dictionary of the English Language* (2d ed. 1945).[8]

(4th Cir. 1984) (en banc), cert. granted, No. 84-5872 (Feb. 26, 1985) (negligent injury to the person, unlike negligent injury to property, does not constitute a deprivation of a protected interest) (alternative holding); *Wise* v. *Bravo*, 666 F.2d 1328, 1333 (10th Cir. 1981) (an act by a state officer will give rise to liability under Section 1983 only if it is "grossly disproportionate * * * and * * * inspired by malice rather than merely carelessness") (dictum); *Rittenhouse* v. *DeKalb County*, 764 F.2d 1451, 1459 (11th Cir. 1985) (Pittman, J., concurring).

[8] This reading of the Fourteenth Amendment draws support from the Court's holdings that the Equal Protection Clause is violated only by intentional acts. See, *e.g.*, *Village of Arlington Heights* v. *Metropolitan Housing Development Corp.*, 429 U.S. 252 (1977). The Equal Protection and Due Process Clauses are contiguous in the Constitution and are grammatically parallel; there is no reason to interpret the Due Process Clause to reach negligent acts when the Equal Protection Clause does not. Moreover, the Due Process Clause of the Fifth Amendment imposes on the federal government restraints equivalent to those imposed on the states by the Equal Protection Clause (see, *e.g.*, *Vance* v. *Bradley*, 440 U.S. 93, 94-95 n.1 (1979)); petitioner's interpretation of due process would re-

3. More fundamentally, petitioner's contention that negligent actions can constitute a "deprivation" within the meaning of the Due Process Clause is based on a misunderstanding both of the role of procedural due process—upon which petitioner's claim purports to be grounded [9]—and of the relationship between the Due Process Clause and the common law of torts. Historically, the guarantee of due process of law has been applied only to deliberate decisions by government officials to deprive a person of life, liberty or property. Negligent injuries, even when inflicted by government employees, are the province of the law of torts, not of procedural due process.[10]

a. The Due Process Clause is " 'intended to secure the individual from the arbitrary exercise of the powers of government' " (*Hurtado* v. *California*, 110 U.S. 516, 527 (1884), quoting *Bank of Columbia* v. *Okely*, 17 U.S. (4 Wheat.) 235, 244 (1819)). See, *e.g.*, *Wolff* v. *McDonnell*, 418 U.S. 539, 558 (1974). When government officials

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quire that the single word "deprive" in the Fifth Amendment be interpreted to reach only intentional acts on some occasions—when the equal protection component of the Amendment is invoked—but to reach negligent acts when the procedural component of the Due Process Clause is at issue. Cf. *Logan*, 455 U.S. at 438 (Blackmun, J., dissenting) (implicitly rejecting the proposition that "anyone * * * who is injured by a random act of governmental misconduct" has "been deprived of equal protection.") Similarly, only intentional and authorized state action can amount to a "taking" within the meaning of the Fifth Amendment's Takings Clause.

[9] Petitioner maintains that his claim involves "procedural due process, pure and simple" (Pet. Br. 14); he expressly disavows any reliance on the substantive component of the Due Process Clause (*id.* at 16; see *id.* at 24-25). But see pages 26-28, *infra*.

[10] The district court concluded that while respondents' actions were negligent, respondents "did not act with deliberate or callous indifference" (J.A. 89). The court of appeals agreed (*id.* at 102). This case accordingly does not present the question—discussed in a portion of the court of appeals' opinion that was not joined by a majority of the court (*id.* at 118)—whether a reckless act that injures a liberty or property interest can constitute a "deprivation."

deliberately decide to deprive an individual of liberty or property, they "exercise • • • the powers of government" directly against that individual. But when a government official inflicts a negligent injury, the "powers of government" have been brought to bear against the individual in a far more oblique and less threatening fashion. Cf. O. Holmes, *The Common Law* 3 (1881).

Inadvertent injuries inflicted by the government may implicate other significant interests; the enactment of tort claims statutes, for example, reflects the view that injuries caused by negligence generally should be redressed. But to view the Due Process Clause as a protection against inadvertent government action is to trivialize its historic role. See *Parratt*, 451 U.S. at 545 (Stewart, J., concurring). The guarantee of due process, "perhaps the most majestic concept in our whole constitutional system" (*Joint Anti-Fascist Refugee Committee* v. *McGrath*, 341 U.S. 123, 174 (1951) (Frankfurter, J., concurring)), is intended to prevent governmental power from being "used for purposes of oppression" (*Murray's Lessee* v. *Hoboken Land & Improvement Co.*, 59 U.S. (18 How.) 272, 277 (1856)). See, *e.g.*, *Chambers* v. *Florida*, 309 U.S. 227, 236-241 (1940); *Dent* v. *West Virginia*, 129 U.S. 114, 123 (1889). It is deliberate action by the government or its agents, not negligent action or inadvertence, that creates a threat of oppression or tyranny.

b. Throughout its history, the guarantee of due process of law has been directed to government actions that deliberately deprived individuals of life, liberty, or property. This Court has explained the derivation of the Due Process Clause as follows (*Twining* v. *New Jersey*, 211 U.S. 78, 100 (1908)):

> [T]he proposition universally accepted by American courts on the authority of Coke, [is] that the words "due process of law" are equivalent in meaning to the words "law of the land," contained in that chapter of Magna Carta, which provides that "no freeman shall be taken, or imprisoned, or disseised, or outlawed, or exiled, or any wise destroyed; nor

> shall we go upon him, nor send upon him, but by the lawful judgment of his peers or by the law of the land."

This language from the Magna Carta obviously was designed to forestall oppression through deliberate acts of government.

As this prohibition has evolved, it has continued to refer to deliberate acts. The phrase "due process of law" has been traced to 28 Edw. 3, ch. 3, which provides:

> No man of what state or condition he be, shall be out of his lands or tenements, nor taken, nor imprisoned, nor disinherited, nor put to death, without he be brought to answer by due process of law.

Corwin, *The Doctrine of Due Process of Law Before the Civil War*, 24 Harv. L. Rev. 366, 368 (1911). See *Ingraham* v. *Wright*, 430 U.S. 651, 673 n.41 (1977). The earliest state cases interpreting the phrase "due process of law" similarly were concerned with the procedures by which deprivations of liberty or property were deliberately imposed on individuals. See, *e.g.*, *Zylstra* v. *Charleston*, 1 Bay 382, 384 (S.C. 1794) (fine imposed by court without jury); Corwin, 24 Harv. L. Rev. at 372-373.

This Court had little occasion to construe the Due Process Clause before the Civil War. See *Davidson* v. *New Orleans*, 96 U.S. 97, 103-104 (1877). The few cases that came before it, however, also concerned only deliberate deprivations of liberty or property. See, *e.g.*, *Murray's Lessee* (distress warrants for summary collection of tax liability). It appears, therefore, that the drafters of the Fourteenth Amendment would have had no reason to believe that the guarantee of due process of law applied to anything other than deliberate deprivations of liberty or property.

Until recent decades, this Court's procedural due process cases generally concerned the procedures that were to be followed in criminal enforcement proceedings or in civil suits leading to the entry of judgment by a court. See, *e.g.*, *Mullane* v. *Central Hanover Bank &*

Trust Co., 339 U.S. 306 (1950); Friendly, "*Some Kind of Hearing*," 123 U. Pa. L. Rev. 1267, 1267-1268 (1975). More recently, the Court has specified the procedures that must be followed in other kinds of proceedings leading to a deprivation of liberty or property. See, *e.g.*, *Goldberg* v. *Kelly*, 397 U.S. 254 (1970); *Bell* v. *Burson*, 402 U.S. 535 (1971). See generally *Logan*, 455 U.S. at 430-431 and cases cited. In some instances, it has permitted process to be provided after the deprivation has occurred. See, *e.g.*, *Ingraham*, 430 U.S. at 674-682; *North American Cold Storage Co.* v. *Chicago*, 211 U.S. 306 (1908). But while these "proceedings" often are informal—they might involve, for example, no more than a decision made by a single low-level government employee whose primary responsibility is not the adjudication of claims (see, *e.g.*, *Ingraham*; *Goss* v. *Lopez*, 419 U.S. 565 (1975))—the Court's rulings have applied the guarantee of procedural due process in the way envisioned at the time of the Magna Carta: to define the procedures the government must follow when its agents deliberately impose a loss of liberty or property on a person.

C. The Due Process Clause Guarantees Procedural Regularity Rather Than A Remedy For Every Injury

1. That the Court never had found a negligent due process "deprivation" prior to *Parratt* was not accidental: it followed directly from the purposes served by procedural due process. As matters now stand, of course, the Due Process Clause does not deny a state the right to deprive persons of property or liberty, so long as it provides due process prior to (or, in some situations, soon after) the deprivation. See *Carey* v. *Piphus*, 435 U.S. 247, 259 (1978). And the state, unless it acts in a wholly arbitrary way (see *Martinez*, 444 U.S. at 282), is responsible for setting the substantive criteria that, if met, will justify a deprivation": [11] it is the state that, for example, determines what circumstances permit the suspension of a driver's license (see *Bell* v. *Burson*,

402 U.S. 535, 541 (1971)), or what actions will lead to a suspension from school (see *Goss* v. *Lopez*, 419 U.S. 565, 573-574 (1975)), or what facts must be shown to support the seizure of property from a prison cell (see *Hudson* v. *Palmer*, No. 82-1630 (July 3, 1984), slip op. 12-18; see also *id.* at 3 (O'Connor, J., concurring)). See generally *Logan*, 455 U.S. at 433; *Memphis Light, Gas & Water Division* v. *Craft*, 436 U.S. 1, 11-12 (1978).

The role of procedural due process in this regime historically has been to guarantee that a person threatened with (or suffering from) a deprivation receives an "opportunity to be heard." *Grannis* v. *Ordean*, 234 U.S. 385, 394 (1924). See *Mullane*, 339 U.S. at 313. This opportunity serves to forestall arbitrary state action and " 'minimize[s] substantively unfair or mistaken deprivations of' life, liberty, or property by enabling persons to contest the basis upon which a State proposes to deprive them of protected interests," *Carey*, 435 U.S. at 259-260, quoting *Fuentes* v. *Shevin*, 407 U.S. 67, 81 (1972); adequate process helps assure that the state will take into account the factors that it has deemed relevant to the deprivation.

Process, however, "is not an end in itself" (*Olim* v. *Wakinekona*, 461 U.S. 238, 250 (1983); see *Codd* v. *Velger*, 429 U.S. 624 (1977)), and a person denied due process cannot recover more than nominal damages unless he is able to show that adequate process would have affected the state's decision. *Carey*, 435 U.S. at 260.[12] And "minimization" of error does not mean elimination of error: the Due Process Clause does not require the state to reach a correct decision, or to apply its criteria

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[11] This power, of course, is the flip side of the state's ability to create property interests by, for example, providing that certain categories of persons are eligible for welfare benefits, or that certain actions give rise to civil liability. See, *e.g.*, *Atkins* v. *Parker*, No. 83-1660 (June 4, 1985), slip op. 13, quoting *Richardson* v. *Belcher*, 404 U.S. 78, 81 (1971); *Logan*, 455 U.S. at 432-433.

[12] Due process does, of course, have a substantive component; that point is discussed below (at 26-28).

properly. If, for example, the Georgia Department of Public Safety had given motorist Bell a proper hearing, but had suspended his license because it erroneously had concluded on the facts before it that he was a dangerous driver (cf. *Bell*, 402 U.S. at 539-543), the federal courts would not have stepped in to correct the error. See *Martinez*, 444 U.S. at 284-285 & n.9; *Baker* v. *McCollan*, 443 U.S. 137 (1979). The Clause thus guarantees only an opportunity to be heard, and to have a claim of right fairly judged.

2. As described above, procedural due process forestalls oppression or misuse of authority by forcing those who would work a deprivation to take the relevant factors into account; as understood to this point, application of the Clause presupposes knowing or systematic state conduct. Petitioner, however, envisions an entirely different role for procedural due process.

That petitioner's suit does not present a traditional due process claim is demonstrated by the relief he seeks. He does not ask for a hearing to show that the state improperly applied its stated criteria,[13] or contend that the state's statutory tort limitation should be declared unconstitutional (see J.A. 121). Instead, he complains only that he has suffered an injury that can be traced to the state's

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[13] To be sure, petitioner presumably would contend that the state has made negligence wrongful, so that the state violates its own standards when it acts negligently. But the concepts of procedural regularity and reasoned decisionmaking—which are at the heart of the Due Process Clause—have no application to negligent action. The state simply has committed an error; petitioner is no more entitled to compensation than would be the hypothetical motorist in the example discussed in text. Indeed, now that New Jersey has changed its common law rules to make petitioner's injury non-remediable, it is doubtful that respondents' actions can be characterized as legal wrongs. See *Logan*, 455 U.S. at 433 (an immunity defense, like any other element of a tort claim, may be viewed as an aspect of the state's definition of the claim); *Martinez*, 444 U.S. at 282 n.5 (same). Cf. *Duke Power Co.* v. *Carolina Environmental Study Group, Inc.*, 438 U.S. 59, 88 n.32 (1978); *Munn* v. *Illinois*, 94 U.S. 113, 134 (1877).

error. He argues that the Due Process Clause makes that error unconstitutional, despite the state's lack of awareness that it was causing injury, because the state has refused to correct its mistake. He therefore insists that the guarantee of *procedural* due process accords him something more than procedural regularity on the part of the state: in his view, it grants him a *substantive* right to recover damages for his injury in federal court. In essence, then, his assertion is that the Clause directs the courts to fashion a federal law of torts—but to do so interstitially, to cover fortuitous gaps in state tort law.[14]

3. We therefore return to our initial objection to petitioner's claim: that it distorts the Due Process Clause by importing into it the values and principles of tort law. This Court's repeated holdings indicate that the Due Process Clause is designed to ensure procedural regularity, and thus serves purposes distinct from the purposes of the common law of torts. Notions borrowed from the law of torts are therefore not to be incorporated wholesale into the Due Process Clause.

In *Baker*, for example, the plaintiff was arrested by a sheriff pursuant to a warrant and held for several days until it was discovered that he was not the person sought. He brought suit under Section 1983, claiming that his rights under the Due Process Clause of the Fourteenth Amendment had been violated. The court of appeals upheld his claim, relying on the elements of the tort of

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[14] The district court, whose judgment petitioner is defending, accepted petitioner's invitation to fashion such a tort law; the court itself judged the merits of petitioner's negligence claim and awarded him compensation. Had petitioner's claim been a traditional one for the deprivation of procedural due process, however, the court simply would have directed the state to provide petitioner with proper procedural protections. Compare *Logan*, 455 U.S. at 434. And the court could not, in any event, have awarded damages without determining that petitioner would have prevailed under an adequate state post-deprivation process. See *Carey*, 435 U.S. at 260.

false imprisonment (see 443 U.S. at 142, 146) and reasoning that the sheriff " 'ha[d] a duty to exercise due diligence in making sure that the person arrested and detained is actually the person sought under the warrant' " (*McCollan* v. *Tate*, 575 F.2d 509, 513 (5th Cir. 1978), quoted at 443 U.S. at 146). This Court reversed, emphatically stating that the court of appeals had erred in equating tort law wrongs with violations of the Due Process Clause.

The Court acknowledged that the plaintiff's detention may well have been wrongful under state tort law (443 U.S. at 142). But the Court held that due process had been accorded, because the state's procedures complied with constitutional requirements. That the procedures had been applied negligently did not give rise to a constitutional wrong: "Section 1983 imposes liability for violations of rights protected by the Constitution, not for violations of duties of care arising out of tort law. Remedy for the latter type of injury must be sought in state court under traditional tort law principles." 443 U.S. at 146.[15]

In *Paul*, the Court applied the same principle to another aspect of the Clause. It there ruled that an individual's "interest in reputation"—an interest that has long been protected by the common law—"is neither 'liberty' nor 'property' guaranteed against state deprivation without due process of law." 424 U.S. at 712. The Court reasoned that to treat all interests protected by the common law as "liberty" or "property" "would seem almost necessarily to result in every legally cognizable

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[15] The Court has used an analogous analysis in the Eighth Amendment context, holding that a prisoner's claim of medical mistreatment states a constitutional violation only if it involves "deliberate indifference to serious medical needs" (*Estelle* v. *Gamble*, 429 U.S. 97, 106 (1976)); "[a]n accident, although it may produce added anguish, is not on that basis alone to be characterized as wanton infliction of unnecessary pain." *Id.* at 105. The "proper forum" for the latter type of claim is state court. *Id.* at 107. See J.A. 120 n.9.

injury which may have been inflicted by a state official acting under 'color of law' establishing a violation of the Fourteenth Amendment. We think it would come as a great surprise to those who drafted and shepherded the adoption of the Amendment to learn that it worked such a result * * *." 424 U.S. at 699. If, as *Paul* held, a court is not to ascertain the content of "liberty" or "property" by referring to the interests protected by the common law, there is no reason for it to define "deprivation" by reference to common law concepts of fault such as negligence.

That this is so is demonstrated by *Martinez*. In that case, the survivors of a person killed by a parolee brought suit under Section 1983 against state officials who were responsible for the parolee's release. They alleged that the parole decision was "not only * * * negligent, but also * * * reckless, willful, wanton and malicious" (444 U.S. at 280 (footnote omitted)) and that it deprived the decedent of life without due process of law. The Court unanimously ruled that the plaintiffs had failed to state a claim because the official acts alleged did not constitute a "deprivation" within the meaning of the Due Process Clause. It found the injury "too remote a consequence of the parole officers' action to hold them responsible under the federal civil rights law," since "it is perfectly clear that not every injury in which a state official has played some part is actionable under that statute" (*id.* at 285). The Court thus stated its legal conclusion as follows (*ibid.*; citations omitted):

> Regardless of whether, as a matter of state tort law, the parole board could be said either to have had a "duty" to avoid harm to the [the] victim or to have proximately caused her death, we hold that * * * [the official defendants] did not "deprive" [the] decedent of life within the meaning of the Fourteenth Amendment.

In short, the Court, in interpreting the word "deprive," unanimously rejected the contention that a plaintiff who has proven a causal connection between an official act

and his injury sufficient to establish "causation" according to the law of torts has thereby shown a "deprivation." Petitioner's argument here cannot be squared with that conclusion.[16]

D. Petitioner's Claim Is Grounded On Substantive, Rather Than Procedural, Due Process

The discussion above suggests that petitioner's claim rests on concepts that are foreign to the traditional notion of procedural due process. But there is an additional reason for petitioner's inability to reconcile his contention with this Court's due process decisions, which goes beyond the ahistorical and illogical nature of his argument: in our view, petitioner's claim is not a procedural one at all.

As noted above, procedural due process claims relate to the procedures that must accompany—and that make permissible—deprivations of life, liberty, or property. But it is nonsensical to talk about petitioner's claim in those terms, because he is complaining about the sort of "action[] governmental officials may not take no matter what procedural protections accompany [it]." *Hudson*, slip op. 2 n.4 (Stevens, J., concurring in part and dissenting in part). See *Parratt*, 451 U.S. at 545 (Blackmun, J., concurring). A state official could not have inflicted the injuries that petitioner suffered (or caused him to be injured by another inmate) on any showing under the most rigorous procedures; doing so would violate the prescriptions imposed by the Eighth Amendment or by

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[16] Petitioner attempts to distinguish *Martinez* by reading the Court's opinion as holding that "had proximate cause been established between the parole board's negligence and the death of the victim, § 1983 would provide a remedy" (Pet. Br. 20). As we note in text, however, the Court expressly found it irrelevant that the parole board might, as a matter of tort law, have proximately caused the victim's death. Petitioner also attributes special significance to the duty of care owed by a prison official to a prisoner (Pet. Br. 9-10). Yet in *Baker* the Court found no due process violation despite the sheriff-defendant's negligent violation of his duty to use due care. See pages 24-25, *supra*.

the *substantive* component of the Due Process Clause. See, *e.g.*, *Williams* v. *Mussomelli*, 722 F.2d 1130 (3d Cir. 1983); *King* v. *Blankenship*, 636 F.2d 70 (4th Cir. 1980); *Jackson* v. *Bishop*, 404 F.2d 571 (8th Cir. 1968). Cf. *Rochin* v. *California*, 342 U.S. 165 (1952). Petitioner's claim cannot be that he received inadequate process, because no process would have justified the state's infliction of the injury that occurred here.[17]

Petitioner's claim therefore must be grounded on substantive due process. And as such, it cannot prevail. Petitioner himself appears to disavow any contention that the state's action infringed substantive constitutional standards, and it is in any event plain that the simple negligence he alleges does not involve a deliberate infliction of serious injury, or conduct that "is so otherwise offensive to 'the concept of ordered liberty,' *Palko* v. *Connecticut*, 302 U.S. 319, 325 (1937), as to warrant * * * finding" a substantive due process violation. *Baker*, 443 U.S. at 147 (Blackmun, J., concurring); see *id.* at 148; *Rochin*, 342 U.S. at 172, 173; *Gumz* v. *Morrissette*, No. 84-3124 (7th Cir. Sept. 5, 1985), slip op. 7-12.

This conclusion points up the basic anomaly in petitioner's position. By insisting that every injury to person or property gives rise to a procedural due process claim (so long as it is not remediable in a state tort suit), he is attempting to convert an implausible substantive suit into a live procedural one. In the process, he is distorting the meaning of the Clause as a whole. Procedural due process is designed to assure regularity in the conscious decisionmaking processes of government; substantive due process stands as a bar to conduct that is

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[17] Petitioner insists that he challenges not the particular acts of respondents but the state's failure to create a tort remedy (Pet. Br. 16-17). If this is so, however, one might question why he brought suit against individual state officers who plainly had no responsibility for enacting the immunity statute at issue. See *Parratt*, 451 U.S. at 550-551 n.8 (Powell, J., concurring in the result).

inconsistent with the "decencies of civilized conduct." *Rochin*, 342 U.S. at 175. Petitioner, however, would have procedural due process swallow its substantive counterpart and guarantee the injured an opportunity to remedy every wrong. However "admirable" this goal might be in "the best of all possible worlds" (*Parratt*, 451 U.S. at 531), it is not one that the Due Process Clause was designed to achieve.

II. EVEN IF PETITIONER WAS "DEPRIVED" OF LIBERTY WITHIN THE MEANING OF THE DUE PROCESS CLAUSE, HE WAS ACCORDED DUE PROCESS

Even granting petitioner all of the dubious premises discussed above—that his claim is one grounded on procedural due process, that negligent acts can give rise to constitutional "deprivations," and that he in fact suffered a deprivation of "liberty"—he still has not made out a constitutional violation. He must, in addition, demonstrate that he has not received adequate process.

A. Petitioner insists that he could not have been granted due process because the New Jersey tort scheme makes it impossible for him to obtain a damages award on his claim (Pet. Br. 22). But it never has been the law that a state violates the Due Process Clause whenever it employs substantive or procedural rules that preclude persons from obtaining relief for certain injuries caused by state actors. The Court has indicated, for example, that states may "erect reasonable procedural requirements for triggering the right to an adjudication," such as statutes of limitations or filing fees. *Logan*, 455 U.S. at 437.[18] And in *Martinez*, the Court rejected the

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[18] Procedural barriers of this sort may, of course, effectively deny plaintiffs who were injured by the state any opportunity to obtain relief—for reasons largely or wholly beyond the plaintiffs' control. See, *e.g.*, *United States* v. *Kubrick*, 444 U.S. 111, 124 (1979); *United States* v. *Kras*, 409 U.S. 434 (1973); *id.* at 455 (Stewart, J., dissenting).

claim that an immunity statute very similar to the one at issue here denied the plaintiffs due process, explaining that "the State's interest in fashioning its own rules of tort law is paramount to any discernible federal interest, except perhaps an interest in protecting the individual citizen from state action that is wholly arbitrary or irrational." 444 U.S. at 282.[19]

In determining whether a particular litigation rule is consistent with due process, then, it is not enough to find (as petitioner suggests) simply that the rule has the effect of denying plaintiffs relief; instead, the state may deny an individual access to the courts when "the balance of state and private interests favors the government scheme." *Logan*, 455 U.S. at 430 n.5. The inquiry required by this principle—which essentially goes to the question whether the procedural system as a whole is fundamentally fair—thus parallels the analysis used in traditional due process cases to determine whether a given procedural provision provides adequate protection against the risk of erroneous deprivations. See, *e.g.*, *Mathews* v. *Eldridge*, 424 U.S. 319, 334-335 (1976). In this case, determining whether due process has been accorded therefore requires an inquiry into the magnitude of petitioner's private interests in maintaining his suit (which presumably includes consideration of the availability of a suit against the prisoner who injured him, see J.A. 92, 126) as measured against the interests served by the state immunity statute. Cf. *Martinez*, 444 U.S. at 282-283. Judge Garth engaged in just such an analysis below, and concluded that here the balance must be "struck in favor of the state" (J.A. 126).

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[19] Of course, state law cannot immunize a state official from liability in a Section 1983 suit if the official is found to have committed a *substantive* constitutional violation, as the Court noted in *Martinez*. See 444 U.S. at 284 n.8. But that is not the contention here. The question in this case is whether a tort system that makes use of official immunities should, for that reason alone, be deemed to accord inadequate *procedural* due process.

B. As repeated decisions of this Court demonstrate, a procedural system cannot be deemed either arbitrary or fundamentally unfair simply because it makes use of statutes or common law rules that create official immunities. Such rules serve important purposes that benefit society as a whole; this Court has long recognized the importance of the principle that "officials of government should be free to exercise their duties unembarrassed by the fear of damage suits in respect of acts done in the course of those duties" (*Barr*, 360 U.S. at 571 (plurality opinion)).

Official immunities, for example, forestall the danger that the prospect of liability will disable government officers from "execut[ing] [their] office[s] with the decisiveness and the judgment required by the public good." *Scheuer* v. *Rhodes*, 416 U.S. 232, 240 (1974). And it spares officials from a flood of frivolous or retaliatory lawsuits. See, *e.g.*, *Economou*, 438 U.S. at 509-510. Identical interests are served by statutes, such as the New Jersey law at issue here, that preclude claims against officials grounded on certain types of injuries. See *Martinez*, 444 U.S. at 282-283 & n.6. Petitioner therefore cannot prevail on his claim that, because he is unable to obtain compensation from respondents, the New Jersey tort system necessarily denies him due process.[20]

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[20] If petitioner is correct in his assertion that he has made out a deprivation of liberty—and if the process here is inadequate because it offers him no remedy—he will have succeeded in sweeping away virtually all sovereign or official immunities, for intentional as well as negligent official conduct. And he will have done more than that: he will have called into question the constitutionality of all rules that create substantive limitations on liability, at least insofar as they apply to actions of government officials. Indeed, acceptance even of petitioner's underlying premise—that he has been deprived of liberty by respondents' negligence—would subject immunity rules (and other rules limiting liability) to a balancing analysis of the sort discussed in text. This result in itself would require a novel and extraordinarily far-reaching participation by federal judges in the design of state liability schemes.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

CHARLES FRIED
Acting Solicitor General

RICHARD K. WILLARD
Acting Assistant Attorney General

KENNETH S. GELLER
Deputy Solicitor General

CHARLES A. ROTHFELD
Assistant to the Solicitor General

BARBARA L. HERWIG
DOUGLAS N. LETTER
Attorneys

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